Supreme Court of the United States

October Term, 1964

No. [redacted]52

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,
Plaintiffs-Appellants,

BENJAMIN E. SMITH and BRUCE WALTZER,
Intervenors-Appellants,

against

JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JIMMIE H. DAVIS, individually and as Governor of the State of Louisiana, JACK P. F. GREMILLION, individually and as Attorney General of the State of Louisiana, COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, and JIM GARRISON, individually and as District Attorney for the Parish of Orleans, State of Louisiana,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION

JURISDICTIONAL STATEMENT

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A. The Opinions Below.

The majority and dissenting opinions of the three-judge Federal District Court for the Eastern District of Louisiana, New Orleans Division, have not yet been officially

reported. The majority opinion of District Court Judges Frank B. Ellis and Gordon West is set forth in full in Appendix A to this Statement. The dissenting opinion of Circuit Court Judge John Minor Wisdom is set forth in full in Appendix B to this Statement.

B. Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

(i) This is an appeal from an opinion and order of a three-judge Federal District Court convened pursuant to Title 28 U. S. C. Sections 2281 and 2284. The appellants instituted a plenary federal action on November 12, 1963 seeking an interlocutory and permanent injunction restraining the enforcement of certain Louisiana State statutes, (see Appendix C) and seeking equitable and declaratory relief pursuant to Title 42, U. S. C. 1983, 1985 to protect federally protected constitutional rights. A three-judge district court was duly convened by the Chief Judge of the Court of Appeals for the Fifth Circuit. A temporary restraining order restraining the defendants from proceeding with the criminal enforcement of the state statutes against the appellants was entered by Circuit Judge Wisdom on November 18, 1963 and was continued by the Court pending the hearings on appellants' motion for interlocutory relief.

On December 9, 1963, the three-judge Court convened and heard argument on the constitutionality of the state statutes on their face. The Court shortly thereafter ordered a hearing on the question as to whether evidence was admissible as to the constitutionality of the state statutes as applied. This hearing was held on January 9th, 1964. At the conclusion of the hearing on whether evidence would be permitted, the majority of the three-judge court announced in an oral ruling from the bench that (1) the statutes were constitutional on their face, and that (2) the complaint failed to state a claim upon which relief

can be granted. Accordingly the majority of the Court set aside and vacated the temporary restraining order previously issued, denied the motion for interlocutory relief, dismissed the complaint and denied a motion for a stay pending appeal to this Court. Circuit Judge Wisdom dissented from each of these rulings.

On February 13, 1964 the majority of the Court filed a written opinion and order which modified and vacated certain of its conclusions of January 9th. (See Appendix A.) In this opinion the majority of the Court vacated by its own motion its finding on January 9th that the state statutes were constitutional on their face. The majority of the Court, however, reaffirmed its prior determination denying the application for injunctive relief and dismissing the suit for failure to state a claim upon which relief can be granted. (Appendix A.) Circuit Judge Wisdom filed separately his opinion dissenting from the rulings of the majority of the Court. (Appendix B.) Circuit Judge Wisdom would find:

(1) that the state statutes involved are in part unconstitutional on their face, in violation of the First and Fourteenth Amendments to the Constitution of the United States;

(2) that the state statutes here involved are superseded by existing federal legislation and their enforcement is accordingly suspended;

(3) that the complaint stated a cause of action for relief and may not be dismissed;

(4) that the refusal to permit the appellants to adduce evidence as to the constitutionality of the statute as applied violated their rights to due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. The appellants have appealed to this Court from each and every ruling of the majority of the three-judge District Court.

(ii) The judgment and orders sought to be reviewed are the judgment and orders of the majority of the three-judge federal District Court for the Eastern District of Louisiana, New Orleans Division, contained in the minute entry of that Court entered on January 9, 1964, and the order and judgment contained in the opinion of the majority of the three-judge District Court entered and filed on February 13, 1964. This opinion is set forth in full in Appendix A to this Statement. A notice of appeal was duly filed with the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division, on January 31, 1964. An amended notice of appeal to this Court, subsequent to the filing of the February 13 opinion of the majority of the Court, modifying its findings of January 9th, was also duly filed with the Clerk of the United States District Court for the Eastern District of Louisiana, New Orleans Division, on February 25, 1964.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1253.

(iv) Cases sustaining the jurisdiction of this Court are:

Anderson, et al. v. *Martin,* No. 51, October Term, 1963, decided January 13, 1964;
Louisiana v. *NAACP,* 366 U. S. 293;
Kesler v. *Department of Public Safety,* 369 U. S. 486;
Query v. *United States,* 316 U. S. 486;
Stratten v. *St. Louis, S. W. Railroad Cos.,* 282 U. S. 10;
Ex Parte Northern Pacific Railway Co., 280 U. S. 142.

(v) The validity of Louisiana Revised Statutes Title 14, Sections 358 through 374, the Louisiana "Subversive Activities and Communist Control Law" and Louisiana Revised Statutes Title 14, Section 390 through 390.8, the Louisiana "Communist Propaganda Control Law" is here involved. The texts of these statutory provisions are set forth in full in Appendix C to this Statement.

C. Questions Presented by the Appeal.

The following questions are presented by this appeal:

(1) Whether Louisiana Revised Statutes Title 14, Sections 358 through 374, the "Subversive Activities and Communist Control Law" and Louisiana Revised Statutes Title 14, Section 390 through 390.8, the Louisiana "Communist Propaganda Control Law", violate on their face the freedoms of speech, press, assembly, association and the right to petition for redress of grievances guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

(2) Whether these state statutes are so vague and indefinite and without adequate standards as to violate on their face the due process clause of the Fourteenth Amendment to the Constitution of the United States, as well as the privilege against self-incrimination.

(3) Whether these state statutes have been superseded by existing federal legislation.

(4) Whether these state statutes as applied to the appellants violate the First and Fourteenth Amendments to the Constitution of the United States.

(5) Whether the refusal to permit appellants to adduce any evidence before the three-judge District Court as to the constitutionality of the state statutes drawn in question or as to the constitutionality of their application to the appellants violated appellants' right to due process of law.

(6) Whether a complaint states a cause of action for relief under the Constitution and laws of the United States where a complaint alleges that the plaintiffs are threatened with irreparable injury to fundamental federally protected constitutional rights resulting from the imminent enforcement of unconstitutional state statutes.

(7) Whether a complaint which charges that officials of the State of Louisiana under the guise of combatting

subversion are, in fact, using its laws for the sole purpose of punishing citizens for their advocacy of civil rights for Negro citizens and intimidating them and others from exercising federal rights under the first Amendment to achieve the equality guaranteed by the Fourteenth Amendment, states a cause of action for relief under the Constitution and laws of the United States?

(8) Whether the District Court had power to enjoin threatened state court criminal prosecutions of the appellants in order to protect fundamental federal rights guaranteed by the Constitution and laws of the United States from immediate and irreparable injury.

D. Statement of the Facts of the Case.

There is no dispute as to the material facts of this case. Both the majority of the three-judge court and Circuit Judge Wisdom dissenting, accept as true for the purposes of this proceeding all the allegations in the complaint.

The facts material to the consideration of the questions presented are set forth in both the majority and dissenting opinions. They are as follows:

The plaintiff-appellant Southern Conference Educational Fund, Inc. is an association whose purpose for many years has been to seek to improve economic, social and cultural standards in the South in accordance with the highest American institutions and ideals. Its principal activity has been to promote civil rights for Negro citizens by education, correspondence and the publication of a newspaper. Plaintiff-appellant James A. Dombrowski is the executive director of the Fund (Appendix B at p. 25a) and possesses a Doctor of Philosophy degree from Union Theological Seminary.

The two appellant-intervenors, Benjamin Smith and Bruce Waltzer are practicing lawyers in New Orleans,

Louisiana. They have been active in civil rights cases, representing Negroes in many desegregation cases. They have represented the American Civil Liberties Union in the State of Louisiana in many cases (Appendix B at p. 23a). Intervenor-Appellant Smith is the Treasurer of the Southern Conference Educational Fund. Intervenor Waltzer is his law partner and has no connection with the Fund, other than professional representation.

On October 9th, 1963, during the holding of the first interracial lawyers conference in the recent history of the City of New Orleans the two intervenor-lawyers and Dr. Dombrowski were arrested by police officials on warrants charging violation of the Louisiana anti-subversion laws. Their offices were raided and files and records seized, including legal files. The circumstances of the arrests are concisely set forth in Judge Wisdom's opinion (Appendix B at p. 23a).

> "At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrests resulted from 'racial agitation'. An able, experienced, and independent-minded district judge of the Criminal District Court for the Parish of Orleans, after hearing evidence, discharged the plaintiffs from arrest on grounds that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests."

Despite the discharge of the plaintiffs by the state court from arrest on the ground that there was no reasonable

cause for the issuance of the warrants Representative Pfister and the Louisiana Un-American Activities Committee nevertheless demanded the immediate criminal enforcement of the so-called state anti-subversion laws against the appellants.

The appellants then turned to the Federal courts for protection against this serious and imminent threat to their fundamental constitutional rights. They sought permanent and interlocutory injunctive relief restraining the enforcement of these state statutes as unconstitutional on their face and as applied, and as superseded by existing federal legislation. They sought permanent and interlocutory relief under Title 42 U. S. C. 1983 and 1985 against a conspiracy under color of state law to deprive them of rights, privileges and immunities guaranteed to them under the Constitution and laws of the United States.

Immediately after the filing and serving of this complaint and the convening of a three-judge District Court pursuant to Title 28 U. S. C. 2281 a grand jury was summoned in the Parish of New Orleans to consider returning indictments against the individual appellants in response to the demands by Representative Pfister for enforcement of the so-called anti-subversion laws. Circuit Court Judge Wisdom thereupon issued a temporary restraining order restraining any prosecutive action against the appellants pending the hearing and determination of the cause by the three-judge court. This restraining order was in effect until its dissolution by the majority of the court on January 9th, 1964, Judge Wisdom dissenting.

The complaint charged and the appellants sought to prove by affidavits and in a written offer of proof that the threatened enforcement of these state laws is in every respect an attempt to enforce Louisiana's policy of racial segregation. The appellants asserted and offered to prove that the arrests, the raids, the seizure of books, files, membership lists and the threatened imprisonment of the appellants is a conscious effort to frighten, intimidate and

deter the appellants and thousands upon thousands of Negro citizens of Louisiana and those white citizens courageous enough to support them, from challenging the denial by the State of equality under the law to its Negro citizens.

Circuit Judge Wisdom summarized sharply the factual thrust of the complaint:

> "The distinguishing feature of this case, which the majority chooses to ignore, is the contention that the State, under the guise of combatting subversion, is in fact using and abusing its laws to punish the plaintiffs for their advocacy of civil rights for Negroes. It so happens that the plaintiffs contend that the Louisiana Anti-Subversion Law is unconstitutional and, besides, has been superseded by congressional legislation. If those contentions are sound, unquestionably the plaintiffs have a right to relief in the federal court. But the deep thrust of the complaint is the State's abuse of its power as to the plaintiffs. If the evidence on this point should support the plaintiffs, they would be entitled to relief—even if the law were clearly constitutional".

And in the same context Judge Wisdom characterized appellant's offer of proof to support the complaint:

> "As emphasized earlier, the plaintiffs contend that, even if the law is valid on its face, the State has searched their homes and offices, seized their property, arrested them, and is about to prosecute them not because they are Communists—they deny any connection with communism—but because their thinking is not compatible with the State's segregation policy. The plaintiffs offer proof in the form of affidavits and witnesses willing to testify".

The majority of the Court refused to hear any evidence, declined to act on the constitutional issues presented under the assumption that the complaint failed to state a cause of action for relief, and totally abdicated any federal

responsibility resting upon what Circuit Judge Wisdom characterizes as "a sort of visceral feeling that somehow, if relief were granted, the Court would be impinging on States' Rights" (Appendix B at p. 16a).

Following the vacating of the restraining order prohibiting prosecutive action Dr. Dombrowski was indicted for violation of Rev. Stat. Title 14, Section 360 for failing to register with state authorities as a member of the Southern Conference Educational Fund, charged with being a "communist-front" organization in that it was "essentially the same as the Southern Conference for Human Welfare" cited by the House Committee on Un-American Activities in 1944 and 1947 as a communist front organization. This count carries a penalty of 10 years imprisonment and $10,000 fine. A second count charged Dr. Dombrowski with participating in the management of a "subversive organization" in that he was Executive Director of the Southern Conference Educational Fund. This count carries an identical penalty.

Benjamin Smith was indicted on 3 counts for being a member of Southern Conference, its Treasurer, and for being a member of the National Lawyers Guild. Bruce Waltzer was indicted solely for being a member of the National Lawyers Guild. The indictments are set forth in full in Appendix D.

E. The Questions Presented Are Serious and Substantial.

(1) The District Court had the power and the duty to entertain the complaint.

(i) This appeal raises questions of profound importance to the functioning of the Federal district courts within the framework of the Federal Union. If the opinion of the majority of the court below should be sustained the fundamental role of the Federal district court as a forum for

the protection of federally created constitutional rights will disappear. As the dissenting opinion of Circuit Judge John Minor Wisdom so clearly warns, should the invocation of the doctrine of "States Rights" to justify abdication of federal judicial responsibility be tolerated the command of the Supremacy Clause will be nullified.

An acceptance of the doctrines of federal judicial impotence espoused by Judges West and Ellis would result in the virtual closing down of the only meaningful judicial tribunals in the states of the deep South presently available for the vindication of fundamental federal constitutional rights. The elimination of any effective judicial forum for the prompt and decisive protection of these rights, within the context of the ever-increasing movement of Negro citizens for equality and freedom, would create a constitutional crisis of grave dimension. The absence of any tribunal of original jurisdiction prepared to enforce federal constitutional rights would threaten the fundamental assumptions underlying the national commitment to a theory of government under law which encourages and permits social progress and change to take place within the channels of peaceful democratic expression.

The gravity of the questions posed by the lower court's renunciation of federal judicial responsibility is sharply stated by Circuit Judge Wisdom in his opening comments in the dissenting opinion:

> "* * * the crowning glory of American federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against *all* wrongful governmental invasion of fundamental rights and freedoms.
>
> "When the wrongful invasion comes from the State, and especially when the unlawful state action is locally popular or when there is local disapproval of the requirements of federal law, federal courts must expect to bear the primary responsibility for protecting the individual. This responsibility is not

> new. It did not start with the *School Segregation Cases.* It is close to the heart of the American Federal Union. It is implicit in the replacement of the Articles of Confederation by the Constitution. It makes federalism workable."

(ii) The majority of the court below holds in effect that under the never clearly defined doctrine of "states-rights" the Federal district courts do not have the power to entertain a cause of action seeking injunctive relief against unconstitutional state action. This they maintain is particularly so when state action is posed in terms of defense of the right of "self-preservation". Appendix A, at p. 4a). But as Judge Wisdom bluntly rejoined, "There is not the slightest doubt as to the constitutional power of a federal court to block prosecution in a state court under an unconstitutional statute." (Appendix B, at p. 35a). The refusal of the majority of the three-judge court to entertain the complaint flies in the face of principles of fundamental federal responsibility enunciated as early as *Osborn* v. *Bank of the United States,* 9 Wheat 738, 6 L. Ed. 204 and restated authoritatively in *Ex parte Young,* 209 U. S. 123 (1908).

The power of a federal district court to entertain a cause of action seeking relief from threatened enforcement of an unconstitutional state statute is not open to question. *Ex parte Young, supra; Truax* v. *Reich,* 239 U. S. 33; *Terrace* v. *Thompson,* 263 U. S. 197; *Hague* v. *CIO,* 307 U. S. 496. The fact that a state may ground its threatened unconstitutional action upon an asserted right to self-preservation does not diminish the power or duty of a federal district court to entertain a complaint which seeks relief from the impending unconstitutional state action. Increasingly the utilization of state statutes and procedures to harass and impede the exercise of federally created constitutional rights in efforts to achieve equality for Negro citizens is sought to be justified as a necessary means of protecting the state from subversion. See *Gibson* v. *Florida Committee,* 372 U. S. 539. See also, for example,

the recent series of cases now awaiting decision before the Court of Appeals for the Fourth Circuit in *Baines* v. *City of Danville, Virginia*, #9080, 9081, 9082 and 9083. If the assertion of a state's right to "self-preservation" can effectively negate the existence of federal judicial power to restrain unconstitutional state action, a new formula has been devised to replace the repudiated doctrines of interposition and nullification.

(iii) The majority of the three-judge court not only denies the existence of federal jurisdiction to entertain the complaint but finds that there is no equitable jurisdiction to restrain state criminal statutes or proceedings. This assumption not only disregards the careful affirmative statements by this Court of equity power where criminal statutes or proceedings threaten immediate and irreparable injury, *Ex parte Young, supra; Doud* v. *Hodge*, 350 U. S. 485; *Truax* v. *Reich, supra; Pierce* v. *Society of Sisters*, 268 U. S. 510; *Hague* v. *CIO, supra; Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, but rejects the recent powerful restatement by the Fourth and Fifth Circuits of the necessity for the exercise of this equitable power in the area of the protection of federally created civil rights.

In the Fourth Circuit in the recent thorough and exhaustive opinion in *Jordan* v. *Hutcheson*, 323 F. 2d 597 (1963), and in the Fifth Circuit in a series of landmark opinions including *Browder* v. *Gayle*, 142 F. Supp. 707, (three-judge court) aff'd 352 U. S. 903; *Bush* v. *Orleans Parish School Board*, 194 F. Supp. 182 (three-judge court); *Morrison* v. *Davis*, 252 F. 2d 102 (CA 5); *United States* v. *Wood*, 295 F. 2d 772 (CA 5); *City of Houston* v. *Dobbs*, 232 F. 428 (CA 5); *Bailey* v. *Patterson*, 323 F. 2d 201 (CA 5, Sept. 1963), the concept has been forcibly restated by those Courts of Appeals most familiar with the problem, that federal equity power must be available where state criminal statutes or proceedings are utilized to interfere with or impede the exercise of fundamental federal constitutional rights.

Time and again both Courts of Appeals have sought to explain that this Court's statement in *Douglas* v. *City of Jeannette*, 319 U. S. 157, that equity will not "ordinarily" restrain criminal proceedings does not refute the existence of equitable power to protect fundamental constitutional rights from immediate and irreparable injury. Cf. *City of Houston* v. *Dobbs, supra; United States* v. *Wood, supra.* Yet, as in the opinion of the majority below, the rule of *Douglas* v. *Jeannette, supra,* is constantly invoked by those who would restrict or eliminate the role of the federal courts in this increasingly crucial area of national life. Circuit Judge Wisdom has here carefully restated the principles underlying the assertion of equity jurisdiction in cases involving an imminent threat to fundamental constitutional rights. In affirming this restatement this Court should clarify the statements in *Douglas* v. *Jeannette, supra,* or if necessary modify and limit its language. Cf. the suggestion of the Fifth Circuit in *Morrison* v. *Davis, supra.*

The increasing use of state criminal statutes and proceedings as a device to harass and deter the exercise of fundamental constitutional rights in efforts to obtain equality for Negro citizens, requires a vigorous affirmation of the existence of the necessary federal equity power to protect fundamental federally created rights. See Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification,* 63 Columbia Law Review 1163 (Nov. 1963).

(iv) The majority below asserts that Title 28 U. S. C. 2283 is a bar to the injunctive relief sought in the complaint. As Judge Wisdom has pointed out, the federal plenary action was brought prior to the institution of any state court criminal proceeding. Title 28 U. S. C. 2283 accordingly does not bar equitable relief. *Ex parte Young, supra; Truax* v. *Reich, supra; Looney* v. *Eastern Texas R.R.*, 247 U. S. 214; *American Houses* v. *Schneider*, 211 F. 2d 881 (C. A. 3); Hart and Wechsler, *The Federal Courts and the*

Federal System 847; Moore, *Commentary on Judicial Code*, 408.

Furthermore, Title 28 U. S. C. 2283 by its own terms does not apply to injunctions against state proceedings where injunctive relief has been expressly authorized by an Act of Congress. Such relief has been expressly authorized by the Civil Rights Statute upon which this complaint is grounded. Title 42, U. S. C. 1983 expressly authorizes injunctive relief against state court proceedings. *Morrison* v. *Davis, supra; United States* v. *Wood, supra; City of Houston* v. *Dobbs, supra.* See also Brief Amicus Curiae for the United States in *Baines* v. *City of Danville*, #9080, 9081, 9082, 9083, 4th Circuit, presently awaiting decision, argued September 23, 1963.

Title 28 U. S. C. 2283 may not be distorted so as to frustrate the essence of the principles of comity and equity it was designed to codify. *Smith* v. *Apple*, 264 U. S. 274. It should not be read so as to bar equitable relief which Congress expressly authorized to protect federally created rights.

(v) Judges West and Ellis cloak their abdication of federal judicial responsibility with an assertion of the doctrine of "abstention". But this Court recently disposed of this technique for evading the firm duty of the federal district court to exercise the jurisdiction conferred upon it by Congress in the Civil Rights Act to protect federally created rights. *McNeese* v. *Board of Education*, 373 U. S. 668. A federal district court may not abstain from meeting its obligations under the Constitution and the statutes of Congress to provide a forum for the vindication of fundamental constitutional rights.

The context out of which this appeal rises emphasizes the total abdication of judicial responsibility reflected in the dismissal of the complaint. For, as Circuit Judge

Wisdom concluded in rejecting the holdings and rationale of the majority of the Court:

> "Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms."

For the heart of the matter is, as Judge Wisdom points out:

> "Assuming the truth of the complaint, as the Court *had* to do in order to dismiss the suit, the case is a classic example for raising the shield of the Constitution in protection of a citizen's constitutional rights."

(2) The Louisiana statutes here challenged are violative of the Fourteenth Amendment to the Constitution of the United States on their face.

(i) The statutes here under challenge are so broad in their sweep, so vague and indefinite in their definitions and characterizations of prohibited activity that they fail to meet the most minimal standards of the First and Fourteenth Amendments. *Wright* v. *Georgia,* 373 U. S. 284; *NAACP* v. *Button,* 371 U. S. 415; *Smith* v. *California,* 361 U. S. 147, 151; *Winters* v. *New York,* 333 U. S. 507, 509-510, 517-518; *Herndon* v. *Lowry,* 301 U. S. 242; *Stromberg* v. *California,* 283 U. S. 359; *United States* v. *C. I. O.,* 335 U. S. 106, 142. The unlimited commands of the statutes conflict sharply with the fundamental guarantees of free speech, assembly, association and the right to petition for redress of grievances. *Gibson* v. *Florida Committee,* 372 U. S. 539. *Cramp* v. *Board of Public Instruction,* 368 U. S. 278.

The most cursory examination of these statutes reveals a vagueness and over-breadth trenching upon First Amendment liberties more sweeping than any statutory regulations in this delicate area previously considered by this Court. The statutory definitions patently violate every

guiding principle this Court has developed over the years to protect the freedoms embraced in the First Amendment.

One striking example of the over-breadth of language which turns these statutes into "a dragnet which may enmesh anyone" (see *Herndon* v. *Lowry, supra*) is the critical definition of a "communist" or a member of the "Communist Party". According to the terms of the statutes the "Communist Party" sweeps up within its orbit "any organization which in any manner advocates or acts to further the success of the program of world domination of the international communist conspiracy." All of the serious criminal sanctions imposed by the statutes rest upon this basic definition. But the words here used are simply not "susceptible of objective measurement". *Cramp* v. *Board of Public Instruction, supra,* at p. 286. As this Court pointed out in Cramp, these words permit an "extraordinary sweep." Any organization or group of people, formal or informal, which engages in any activity in the State of Louisiana which may be construed by prosecution officials to parallel or coincide with "in any manner" any of the objectives, immediate or long-range, of what is characterized without further definition as the "communist conspiracy" falls within the proscribed area.

This is no academic or remote possibility. As Judge Wisdom points out in his dissenting opinion in describing the over-breadth of this statutory language:

> "This Court knows from other litigation, particularly United States v. Louisiana, E. D. La., Civil Action No. 2548, that the Louisiana legislature regards the movement to increase Negro voting in the State as part of the Communist conspiracy. *All* of the organizations promoting increased Negro voting registration therefore falls within the definition of "communist party", and any member could be prosecuted under the Louisiana Anti-Subversion Law."

And as this Court recently said in *NAACP* v. *Button, supra*:

> "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes * * *. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens."

The constitutional vice of over-breadth raised by these Louisiana statutes is far more serious than the problems considered by this Court in *NAACP* v. *Button* and *Cramp* v. *Board of Public Instruction*, both *supra*. As Judge Wisdom points out, these statutes were enacted by a state legislature which "regards the movement to increase Negro voting in the state as part of the communist conspiracy." In *Cramp* this Court warned that "it would be blinking reality not to acknowledge that there are some among us always ready to affix a communist label upon those whose ideas they violently oppose." *Supra*, at p. 286. The context within which these statutes were passed and their attempted enforcement against these appellants (cf. *NAACP* v. *Button, supra*) reveal their constitutional invalidity. These statutes on their face lend themselves to "selective enforcement" which may result in "broadly curtailing group activity" and may "easily become a weapon of oppression". Cf. *NAACP* v. *Button, supra*. The most elementary protection of First and Fourteenth Amendment liberties requires the striking down of statutes so patently designed to restrict fundamental freedoms.

The other provisions and definitions of the statutes equally contain the same constitutional defects. For example, the definition of "organization" is so broad and loosely drawn as to sweep within its ken any conceivable association or grouping of people. Cf. *Herndon* v. *Lowry, supra; Stromberg* v. *California, supra*. The definition of a "subversive organization", is void because it of necessity

contains within its scope the vague definition of "communist" discussed above, includes additional indefiniteness. According to the terms of sub-division 5 of Section 359, a "subversive organization" could be any organization which sought a change in the "constitutional form of government of the State of Louisiana" by "unlawful means".

It is scarcely an "absurdity", cf. *Cramp, supra*, to suggest that an organization which sought by active means to abolish the system of segregation in the State of Louisiana might well find itself caught up in this dragnet definition. Even peaceful protest has been characterized by certain state authorities of Louisiana as "illegal" methods of obtaining social change. Cf. *CORE* v. *Douglas*, 318 F. 2d 95, (CA 5 1963). And is it an "absurdity" to suggest that it is possible that authorities of this State consider the system of segregation to be deeply ingrained into the "constitutional form of government of the State of Louisiana"? Cf. *Bush* v. *Orleans Parish School Board, supra.*

The other sections of the statutes lend themselves to the same analysis. We have centered the Court's attention upon the definitions of "communist", "Communist Party", "organization", and "subversive organization", because these are the most important operative definitions in the statute. One other example is illuminative of the general approach. The definition of "communist propaganda" in Sec. 390.1, upon which the penal provision of Sec. 390.2 rests, is, again in the words of this Court, "extraordinary". *Cramp* v. *Board of Public Instruction, supra.*

A definition of "propaganda", which sweeps into its scope any "communication or material * * * which advocates, instigates or promotes any racial, social, political or religious disorder * * * " or which "tends to create or encourage disrespect for duly constituted legal authority, either federal or state", patently violates every principle this Court has ever enunciated to enforce the First and Fourteenth Amendments. Rarely has a statute ever been

brought before this Court so obviously void for vagueness and over-breadth. A reading of these statutes suggests the conclusion that their enactors never seriously contemplated that these proscriptions would ever survive serious constitutional scrutiny.

The simple fact of the matter is that the total effect of the incredibly broad dragnet character of these statutory provisions, the built-in presumption of guilt, the sweeping proscriptions against membership in organizations and the possession of books and literature, is to erect a powerfully effective deterrent against the exercise of the most elementary rights of press, speech, assembly and free association. These statutes constitute a gigantic prior restraint against the exercise of First Amendment liberties by Negro and white citizens of Louisiana in their effort to achieve the equal protection of the laws guaranteed by the Fourteenth Amendment. Relief against the enforcement of such statutes is a paramount responsibility for the federal courts.

(ii) These statutes further violate the constant insistence of this Court that in the area of the First Amendment even though governmental design be legitimate and substantial, that purpose may not be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. *Shelton* v. *Tucker,* 364 U. S. 479; *Lovell* v. *Griffin, supra; Schneider* v. *State, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Talley* v. *California,* 362 U. S. 60. Ample legislation exists on the statute books of Louisiana and the federal government to meet any actual threat or danger to the security of that state. See, for example. R. S. Title 14, Sec. 113 (treason); R. S. 14, Sec. 114 (misprison of treason); R. S. 14, Sec. 115 (criminal anarchy); R. S. 53, Sec. 201 (sabotage). It is perfectly clear that these are not statutes narrowly drawn to meet a specific problem but rather, broadly drawn for the purpose of crippling free exercise of First Amendment rights. As this Court said in *Shelton* v. *Tucker, supra,* "the unlimited

and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases."

If the authorities of the State of Louisiana disagree with the activities of these appellants and thousands of Negro and white citizens of the State in seeking enforcement of the Equal Protection Clause, their recourse does not lie in the threatened enforcement of penal statutes broadly abridging First Amendment liberties. This Court recently found it necessary to restate the fundamental philosophy underlying the guarantees of the First Amendment: "Under our system of government counter-argument and education are the weapons available to expose these matters, not abridgment of the right of free speech and assembly." *Wood* v. *Georgia*, 370 U. S. 375.

(iii) Enactment and attempted enforcement of these statutes by Louisiana is merely another in the many recent attempts to utilize the legislative power of certain of the states to hamper, restrict and outlaw associations of Negro and white citizens joined together for the purpose of seeking implementation of the Equal Protection Clause. In each of these cases this Court has repeatedly struck down these efforts to interfere with the constitutionally protected right of freedom of association. *NAACP* v. *Alabama*, 357 U. S. 449; *Shelton* v. *Tucker, supra; Bates* v. *City of Little Rock*, 361 U. S. 516; *Louisiana* v. *NAACP*, 366 U. S. 293, affirming *Louisiana ex rel. Gremillion* v. *NAACP*, 181 F. Supp. 37; *Gibson* v. *Florida Legislative Investigating Committee*, 372 U. S. 539.

The forcible disclosure of membership in the Southern Conference Educational Fund, for example, or the National Association for the Advancement of Colored People, or the Congress of Racial Equality which might be required by Sec. 360 of the statute, see dissenting opinion of Judge Wisdom, would violate on its face the guiding principles established by this Court to protect freedom

of association. *NAACP* v. *Alabama* and *Louisiana* v. *NAACP*, both *supra*, are totally dispositive here. Sections 385 and 386 of the Louisiana statutes presently before the Court have already been held to be patently unconstitutional. See *Louisiana* v. *NAACP*, *supra*. The entire statutory scheme now here for review is even more clearly an effort to "stifle, penalize or curb the exercise of First Amendment rights". *Louisiana* v. *NAACP*, *supra*, at p. 297.

These Louisiana statutes, and in particular those criminal provisions which the state now seeks to enforce against these appellants, are simply efforts to require the disclosure of membership in organizations which will result in "reprisals against and hostility to the members". *NAACP* v. *Alabama*, *supra*, at p. 463; *Bates* v. *City of Little Rock*, *supra*, at p. 524. Cloaking the demand for exposure of membership in civil rights organizations under the guise of combatting subversion cannot escape the constitutional prohibition. As this Court said in *Bates* v. *Little Rock*, "freedoms such as these are protected not only against heavy-handed frontal attack but also from being stifled by more subtle governmental interference."

(iv) (a) These Louisiana statutes are further void as violative of the due process guarantee of the Fourteenth Amendment. They wholly fail to give any warning of the boundary between constitutionally permissible and constitutionally impermissible application of the statute. *Wright* v. *Georgia*, 373 U. S. 284. See also *Winters* v. *New York*; *Stromberg* v. *California*, both *supra*. See also *Cole* v. *Arkansas*, 333 U. S. 196. They ignore totally the fundamental principle that Americans may not be required at the peril of their liberty to speculate as to the meaning of penal statutes. *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Cohn Grocery Co.*, 255 U. S. 81. This Court has recently warned that these standards operate even more

strictly where the statutes in question inhibit the exercise of individual freedoms affirmatively protected by the Constitution. *Cramp* v. *Board of Public Instruction, supra,* at p. 287. See, also, *Herndon* v. *Lowry, supra; Thornhill* v. *Alabama,* 310 U. S. 88; *Winters* v. *New York,* 333 U. S. 507.

(b) The method of designation of proscribed organizations established in the statute violates the due process clause. The principal method established by the statutes for the designation of proscribed organizations is found in 359 (3) and 390.1 (2). These provisions require that designation of an organization, either through official "citation" or "identification," by the Attorney-General of the United States, the Subversive Activities Control Board or any committee or sub-committee of the United States Congress, "shall be considered presumptive evidence of the factual status of any such organization."

With the exception of the Subversive Activities Control Board all such citations or identifications are ex-parte, unilateral actions arrived at without judicial or quasi-judicial proceedings or the opportunity for judicial review. But this Court has held that the imposition of any sanctions whatsoever, civil or criminal, based upon such methods of designating alleged subversive organizations is violative of the due process clause of the Fifth Amendment. *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123. This inclusion in the Louisiana statutes of a form of designation of proscribed organizations which has already been held violative of due process renders the statutes themselves violative of due process. See *Nostrand* v. *Balmer,* 335 P. 2d 10 (S. Ct. Wash.)

There is an equally serious objection under the Due Process Clause to this method of designation of proscribed organizations. In *Louisiana ex rel. Gremillion* v. *NAACP* (E. D. La. New Orleans Div. 1960), 181 Fed. Supp. 37, a three-judge District Court struck down Sec. 386 of the statute presently before the Court holding that "The stat-

ute would require the impossible. It is clearly unconstitutional."

Sec. 359 (3) and 390.1 (2) equally "would require the impossible." To avoid serious penal sanctions any citizen of the state would be required to keep himself informed at every moment as to any citation or identification made in any way by any of the agencies listed in the sections. Before joining any organizations he would be required to conduct an extraordinary and exhaustive investigation to discover whether over an indefinite period of years the organization had ever been so identified in any way by any of these agencies. This "would require the impossible". See *Louisiana* v. *NAACP, supra.*

The opinion of this Court affirming the three-judge District Court in *Louisiana* v. *NAACP, supra,* wholly disposes of the operative statutory provisions presently before the Court. The present statute not only "would require the impossible of Louisiana residents or workers * * *" but "compounds the vices present in statutes struck down on account of vagueness * * *"

(c) These statutory provisions controlling the designation of proscribed organizations further violate the Due Process Clause in that they create unconstitutional presumptions of guilt. The statutes provide that the fact that an organization has been cited or identified in any way by certain specified federal offices or agencies "shall be considered presumptive evidence of the factual status of any such organization". This presumption is then applicable in the penal provisions of the statutes, Sec. 364 and 390.2. This statutory presumption is clearly unconstitutional. *McFarland* v. *American Sugar Refining Co.*, 1916, 241 U. S. 79, 86. See the recent opinions of the Court of Appeals for the Fifth Circuit in *Barrett* v. *United States,* 322 F. 2d 292 (Sept. 5, 1963, opinion by Wisdom, C. J.), and *Mann* v. *United States,* 319 F. 2d 404 (CA 5, 1963).

(d) These statutory provisions further offend against the Due Process Clause in that they constitute a separation of the power of a state legislature to characterize conduct as criminal, from the responsibility of that body, itself, to control the use of that power. *Sweezy* v. *State of New Hampshire,* 354 U. S. 234. *In Sweezy* this Court held that while the concept of separation of power embodied in the United States Constitution may not be mandatory upon state governments, nevertheless where a violation of this concept "causes a deprivation of the constitutional rights of individuals" this would result in "a denial of due process of law".

The holding of this Court in *Sweezy* is directly applicable here. The Louisiana legislature has improperly delegated its legislative duty to the Attorney-General of the United States, the Subversive Activities Control Board and the committees and subcommittees of Congress. This improper delegation of legislative power results in a serious deprivation of the constitutional rights of individuals, cf. *Louisiana* v. *NAACP, supra,* and constitutes a denial of due process of law. *Sweezy* v. *New Hampshire, supra.*

(e) The registration requirements in Section 360, as enforced by Section 364(7), violates on its face the privilege against self-incrimination. *Blau* v. *United States,* 340 U. S. 159; *Quinn* v. *United States,* 349 U. S. 155. Unlike *Communist Party* v. *SACB, supra,* this question is not raised here prematurely. The defendants have threatened to enforce this statute and in particular the criminal provisions against the appellants. Accordingly, the impact of the privilege against self-incrimination upon the requirement to register is properly before the Court.

(3) The Louisiana anti-subversion laws have been superseded by federal legislation.

Under the principles established by this Court in *Pennsylvania* v. *Nelson,* 350 U. S. 497, Congress has superseded the Louisiana statutes here in question through the en-

actment of the Smith Act of 1940, as amended in 1948, 18 U. S. C. 2385, the Internal Security Act of 1950, 50 U. S. C. 761 et seq. and the Communist Control Act of 1954, 50 U. S. C. 841.

Although the majority of the three-judge court refused to meet the constitutional challenge to the statutes, they discuss supersession at some length concluding that the validity of the state laws can be sustained under this Court's opinion in *Uphaus* v. *Wyman*, 360 U. S. 72, (Appendix A, at p. 10a). Judge Wisdom, dissenting, finds that *Uphaus* does not overrule *Nelson* and concludes that the Louisiana statutes are clearly superseded. (Appendix B, at pp. 27a-34a).

Nelson established three tests to indicate Congressional intention to preempt a field of legislation. Under each of these criteria the conclusion is inescapable that the Louisiana anti-subversion laws have been superseded. 1) The scheme of federal regulation is so pervasive that it can reasonably be inferred that Congress left no room for the states to legislate; 2) The state statutes deal exclusively with an area in which the national interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject; and 3) Enforcement of the state laws present a serious danger of conflict with the administration of the federal program. *Pennsylvania* v. *Nelson, supra*, at p. 502, 504, 505.

There can be little debate that under *Nelson* the Louisiana statutes are superseded and suspended. An almost identical Louisiana statute was struck down as superseded by federal legislation by the Louisiana Supreme Court in *State* v. *Jenkins*, 236 La. 300, 107 So. 2d 648 (1958). See also, *Albertson* v. *Millard*, 345 Mich. 519, 77 N. W. 2d 104; *Commonwealth* v. *Gilbert* 334 Mass. 71, 134 N. E. 2d 13; *Braden* v. *Commonwealth*, 291 S. W. 2d 843 (Kentucky); *Commonwealth* v. *Hood*, 334 Mass. 76, 134 N. E. 2d 1; *Commonwealth* v. *Dolsen*, 183 Pa. Supp. 339 132 A 2d 69.

However, the majority of the lower court reads *Uphaus* as virtually overruling *Nelson*. But every consideration which led this Court in 1956 to enunciate the guiding principles of *Nelson* are equally present today. The broad sweep which the majority below would give to *Uphaus* not only disregards the serious factors which led the Court in *Nelson* to enforce the Supremacy Clause in striking down the Pennsylvania statute, but, as Judge Wisdom points out in his dissenting opinion, "offers great prospects for disguising unlawful state action against federally protected rights".

Unless *Uphaus* is read as overruling *Nelson sub silentio*, it must be confined in the area of prosecutions for seditious activity to situations in which the activity sought to be punished or regulated is directed solely against a state and does not necessarily involve seditious acts against the federal government. As Judge Wisdom carefully demonstrates in his opinion holding the Louisiana laws superseded, these statutes are expressly directed at the same conduct proscribed by Congress.

Both in the preambles and throughout the text of the statutes the Louisiana legislature has frankly stated that the purpose of these particular laws is to legislate in an area already preempted by Congress precisely because "the federal legislation on this subject is either inadquate in its scope or not being effectively enforced" (Appendix C, at p. 57a). Even the narrowest reading of *Nelson* would require the conclusion that such state laws are superseded. Otherwise *Nelson* will have been emasculated into an empty gesture.

At a moment when certain states are increasingly turning to sedition prosecutions as a means "for disguising unlawful state action against federally protected rights" Appendix B, at p. 28a) the principles which were enunciated in *Nelson* assume new vitality. They should not be undermined by a reading of *Uphaus* which would sanction state

prosecutive action in areas clearly preempted by the national government.

(4) The refusal to permit appellants to adduce any evidence as to the constitutionality of the statutes as applied violated due process of law.

One of the most serious questions raised by this appeal arises from the blanket refusal of the majority of the three-judge court to permit the appellants to adduce any evidence whatsoever either in support of their contention that the state statutes were unconstitutional as applied, or in support of the charge that the appellees were engaged in a conspiracy under color of state law to deprive them of federal constitutional rights. See 42 U. S. C. 1983, 1985.

In order to justify its refusal to permit evidence of unconstitutional application the majority below found that the complaint failed to state a cause of action for relief. But as Judge Wisdom points out in his dissection of the majority rationale this results in an incredible conclusion. A federal district court here holds that there is no cause of action or right to relief in a federal court to protect federally guaranteed rights when citizens are threatened with prosecution under a state "anti-subversive" law not because they are subversive but because they advocate equality for Negro citizens. Judge Wisdom states the question sharply:

> "Here again the Court reversed itself. At the first hearing the Court agreed unanimously to receive the evidence at a second hearing. This makes sense. There is no way of deciding whether a law is applied unconstitutionally without hearing evidence as to its application. Evidence was also admissible to show the purpose, operation, and effect of the law. Now, however, the majority has refused to allow the plaintiffs to prove their case by affidavit or by witnesses. The technical basis for the majority decision was its sustaining of the defendants' motion to dismiss on the ground that 'the complaint failed to state a claim upon which relief can be

> granted'. This motion, of course, requires the Court to accept as true all of the allegations in the complaint. In effect the Court held that a citizen has no cause or right of action against the State, to defend federally guaranteed rights and freedoms, when *admittedly* the State is using its Anti-Subversion Law against him, not because he is subversive, but because he advocates civil rights for Negroes."

If appellant's cause of action, as here described by Judge Wisdom, is not a basis for relief in a federal court then the Civil Rights Act and the Fourteenth Amendment are in truth dead letters.

The appellants sought to introduce oral and written evidence to substantiate their claim for relief under the Civil Rights Act and the Constitution. Judge Wisdom concisely summarized the offer of proof:

> "As emphasized earlier, the plaintiffs contend that, even if the law is valid on its face, the State has searched their homes and offices, seized their property, arrested them, and is about to prosecute them not because they are Communists—they deny any connection with communism—but because their thinking is not compatible with the State's segregation policy. The plaintiffs offer proof in the form of affidavits and witnesses willing to testify."

Perhaps unsure of its ground for refusing to hear this evidence, the majority argues that although "evidence has been frequently admitted to show unconstitutional application of statutes" (Appendix A at 13a), in this case since "the very vitals of our constitutional system of government are on the line" the appellants should not be allowed to introduce evidence which might result in a public hearing with "publicity attendant therewith" (Appendix A at 13a). This extraordinary reasoning evoked the comment from the dissenting Circuit Judge that "this rationale illustrates what I mean by the suggestions, respectfully tendered, that perhaps the decision is the result of a visceral reaction."

Evidence tending to show that a state statute otherwise valid on its face is unconstitutional as applied to a given circumstance or individual is clearly admissible. *United States* v. *Caroline Products Co.*, 304 U. S. 144; *Prentis* v. *Atlantic Coastline Co.*, 211 U. S. 210; *Railroad Retirement Board* v. *Alton RR*, 295 U. S. 230; see *Whitney* v. *California*, 274 U. S. 357, 379. Nothing could be more threatening to the "very vitals of our constitutional system of government" than the denial to these appellants of their day in court out of fear of the "publicity attendant" to the airing before the community and the nation of the serious charges they have brought against these state officials. Due process of law is not such a slender reed that it bends before the strong winds of public scrutiny. The issue here posed is as direct as that formulated by Judge Wisdom: "I know this, however; the plaintiffs have a right to sue in the federal district court and fair play entitles them to a day in court to make their proof." (Appendix B at 27a.)

Conclusion

This case urgently calls for the appellate supervisory jurisdiction of this Court. The extensive opinion of Circuit Judge Wisdom reflects throughout his deep concern with the serious and fundamental questions here raised. The decision of District Judges West and Ellis expresses the opinion that "for the good of all it is to be hoped that this case will reach the Supreme Court so that the matter of State-Federal relations in the judicial field may be clarified." (Appendix A at 13a.)

Questions are here raised important not only to the individual appellants but far reaching in their impact upon decisive areas in our national life. The issues presented by this appeal are inextricably bound up with the increasingly pressing question of our era—whether a system of democratic legal institutions can function so as to guarantee the peaceful achievement of equality and freedom for all American citizens. The protection of the exercise of the

fundamental freedoms of speech, press, assembly and association by those who seek the constitutional goal of equality for all is the highest responsibility of the federal courts. It is as Judge Wisdom has here pointed out a responsibility "close to the heart of the American Federal Union." It is a responsibility which may not be abdicated by the federal courts.

The decision below should be reversed, the complaint reinstated, and the relief prayed for granted.

Respectfully submitted,

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APPENDIX A

Majority Opinion of District Judges West and Ellis, Entered on February 13, 1964

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA NEW ORLEANS DIVISION

CA 14019

JAMES A. DOMBROWSKI, ET AL.

v.

JAMES H. PFISTER, INDIVIDUALLY, ETC., ET AL.

ELLIS, FRANK B.—Judge and WEST—Judge.

This is a suit by James A. Dombrowski, Executive Director of Plaintiff Southern Conference Educational Fund, Inc. (hereinafter referred to as the SCEF) and the SCEF seeking to have declared unconstitutional Louisiana Revised Statutes Title 14, Sections 358 through 388, referred to as the Subversive Activities and Communist Control Law, and Louisiana Revised Statutes, Title 14, Sections 390 through 390.5, referred to as the Communist Propaganda Control Law.

The alleged purpose of the SCEF is to (1) promote the general welfare, and (2) to improve the economic, social and cultural standards of the Southern people in accordance with the highest American democratic institutions and ideals.

Defendants are James H. Pfister, a Louisiana State Representative and Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature; Russel R. Willie, a Major in the Louisiana State Police; Jimmie H. Davis, Governor of the State of

Louisiana; Jack P. F. Gremillion, Attorney General of the State of Louisiana; Thomas D. Burbank, Commanding Officer of the Division of Louisiana State Police; and Jim Garrison, District Attorney for the Parish of Orleans, State of Louisiana. All parties defendant are sued individually and in their official capacities.

Jurisdiction of the Court over the complaint is sought under Title 28, United States Code, Sections 1331(a), 1343 (3) and (4), 2201 and 2202; Title 42, United States Code, Sections 1981, 1983, and 1985.

Plaintiffs basically set forth their cause of action in ten paragraphs set forth in Appendix A.

After suit was filed a petition of intervention and complaint was filed by Benjamin E. Smith and Bruce C. Waltzer (hereafter referred to as Intervenors). Mr. Smith is Treasurer of the SCEF and Mr. Waltzer is a "friend and supporter" of the SCEF. The petition of intervention and complaint is fully set forth in Appendix B.

Plaintiffs seek that a permanent injunction issue " * * * restraining the defendants, their agents and attorneys from the enforcement, operation or execution of [the statutes in question] and, restraining the defendants, their agents, and attorneys from impeding, intimidating, hindering and preventing the plaintiffs or members, friends and supporters of plaintiff corporation from exercising the rights, privileges, and immunities guaranteed to them by the Constitution and laws of the United States * * *." The complaint terminates with a demand that a declaratory judgment issue declaring the statutes in question void on their face, and null and void as violative of the Constitution of the United States. Plaintiffs requested that a three-judge Court be convened to hear and determine the proceeding.

Intervenors ask for similar relief and also request that Foreman of the Orleans Parish Grand Jury, the individual members thereof and the Honorable Malcolm V. O'Hara,

Judge, be made parties defendant. In addendum to the complaint the intervenors ask that a permanent injunction issue restraining the Orleans Parish Grand Jury and the Judge in Charge thereof, the Honorable Malcolm V. O'Hara, from enforcing the statutes in question.

Pursuant to plaintiff's request, a three-judge court was convened by the Honorable The Chief Judge for the Fifth Circuit to hear and determine the controversy.

In open court, and prior to a hearing, the court ordered that the motion for leave of court to intervene be granted, there being no objection by defendants. However, the intervention, insofar as it names the Foreman of the Orleans Parish Grand Jury, the individual members thereof and the judge presently in charge of the Grand Jury, the Honorable Malcolm V. O'Hara, as parties defendant, is DENIED.

The first phase of this case was argued on December 9, 1963, and was limited to the constitutionality of the statutes on their face, which was decided in the affirmative by a divided court; and a second hearing was held on January 10, 1964, for the sole purpose of determining after the statute had been constitutionalized whether or not these plaintiffs should be granted a "full blown" trial on the merits, in an attempt to show an unconstitutional application.

In considering this application the judges in the majority have assumed to be true all of the averments made in the petition.

Generally it may be soundly said that if the statutes in question are constitutional then the State Grand Jury, its Foreman, the Judge in charge and other state law enforcement officials may validly proceed with the enforcement and operation of same; and if the statutes are unconstitutional, the proper state or federal court, upon proper application by parties affected, would be the com-

petent forum to enjoin the enforcement and operation of the statute by all officials.

The pleadings reveal that the plaintiffs and intervenors have been engaged, among other things, in urging the southern negro to exercise his constitutional rights to vote, to attend the school of his choice, and to have and enjoy all rights which are foreclosed to him by segregation barriers. The Court would like to first point out that these endeavors, if properly sought, are praiseworthy indeed for we will never enjoy a first class democracy as long as there walks second class citizens among the nearly two hundred million Americans.

However, this should never operate as to bar the state from proceeding in an orderly manner to enforce its own protective statutes, particularly where the federal government has not preempted the field. The State should, and does, have the right to determine in an orderly manner which organization or organizations are primarily or secondarily designed to overthrow, destroy or to assist in the overthrow or destruction of the constitutional form of local government by violence, force or any other unlawful means.

Can we deny the State the basic right of self-preservation, the right to protect itself? If so, truly this would be a massive emasculation of the last vestige of the dignity of sovereignty. This brings us to the specific statutes in question and the injunction requested.

"Federal injunctions against state criminal statutes either in their entirety or with respect to their separate and distinct prohibitions, are not to be granted as a matter of course, even if such statutes are unconstitutional." *Watson* v. *Buck*, 313 U. S. 387, 400. Federal Courts traditionally have refused, except in rare instances to enjoin criminal prosecutions under state penal laws. This principle is impressively reinforced when not merely the relations between coordinate courts, but between coordinate political authorities are in issue, *Stefanelli* v. *Minard*, 342

U. S. 117. This has been manifested in numerous decisions of the Supreme Court involving a State's enforcement of its criminal law, *e.g. Douglas* v. *City of Jeannette*, 319 U. S. 157; *Watson* v. *Buck, supra, Beal* v. *Missouri Pacific Railroad Company*, 312 U. S. 45; *Cleary* v. *Bolger*, 371 U. S. 392. Also see *England* v. *Louisiana Medical Board*, No. 7, October Term, 1963, — U. S. —, wherein Mr. Justice Douglas, in a special concurring opinion, uses the following language setting forth the circumstances under which the federal injunctive power has been denied:

> "A federal court will normally not entertain a suit to enjoin criminal prosecutions in state tribunals, with review of such convictions by this court being restricted to constitutional issues. *Beal* v. *Missouri Pac. R. Co.*, 312 U. S. 45. A federal court declines to entertain an action for declaratory relief against state taxes because of the federal policy against interfering with them by injunction. *Great Lakes Co.* v. *Huffman*, 319 U. S. 293. Where state administrative action is challenged, a federal court will normally not intervene where there is an adequate state court review which is protective of any federal constitutional claim. *Burford* v. *Sun Oil Co.*, 319 U. S. 315; *Alabama Comm'n* v. *Southern R. Co.*, 341 U. S. 341. The examples could be multiplied where the federal court adopts a hands-off policy and remits the litigants to a state tribunal."

These basic principles have been qualified under exceptional circumstances to allow interference when there is a clear showing that an injunction is necessary in order to afford adequate protection of constitutional rights. *Speilman Motor Company* v. *Dodge*, 295 U. S. 89; *Terrace* v. *Thompson*, 263 U. S. 197; *Packard* v. *Banton*, 264 U. S. 445; *Tyson* v. *Banton*, 273 U. S. 418; *Cline* v. *Frank Dairy*

Company, 274 U. S. 445; *City of Houston* v. *J. K. Dobbs Company of Dallas*, 5 Cir. 232 F. 2d 428; *Morrison* v. *Davis*, 5 Cir. 252 F. 2d 102: *United States* v. *Wood*, 5 Cir. 295 F. 2d 172.

Assuredly the Supreme Court did not intend to countenance the application of this exception to the use of injunctive process by the federal system in such a way as to deprive the state and local courts of this nation in the exercise of their sovereign rights of self-protection. This Court should jealously guard these plaintiffs in their constitutional rights to equal protection of the laws, yet in our zeal to protect we should not consciously or unconsciously undermine the whole fabric of state and federal relationship as it struggles to survive its inherent constitutional posture.

The instant case postulates the basic constitutional issue whether threatened prosecution in the state courts imbued as it is with an aura of sedition or treason or acts designed to substitute a different form of local government by other lawful means, may properly be blocked and effectively thwarted by Federal action.[1]

The general rule of *Watson* v. *Buck, supra*, is to be applied where the paramount right of a state to self-preservation is at issue.

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[1] None of the cases cited involved so fundamental an element of state sovereignty as that of self-preservation, e.g. *Speilman* contested the New York Code of Fair Competition for the Motor Vehicle Retailing Trade; *Terrace* contested a Washington law forbidding aliens from owning land; *Packard* contested a New York law requiring motor carriers to post a bond; *Tyson* contested a New York law forbidding resale of tickets to the theatre, etc., at a price in excess of fifty cents of its printed value; *Cline* tested the Colorado Anti-Trust Act; *City of Houston* involved an ordinance forbidding the sale of food to airlines by other than franchised concessionaires; *Morrison* involved the desegregation of the New Orleans public transit system; and *Wood* involved voter intimidation.

Mr. Justice Frankfurter, for the majority of the court, cautioned us in *Steffanelli* v. *Minard, supra,* at pages 123-124, that

> "[W]e would expose every State criminal prosecution to insupportable disruption. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State Courts by resort to the federal forum, with review if need be to [the Supreme] Court to determine the issue."

The Court will not presuppose incompetency or inability of the State Court judges to enforce federally protected constitutional rights. If the evidence has been illegally seized, it may be so declared in those courts; if the statutes in question are unconstitutional, they may be so declared by those Courts, Courts of Appeal, State Supreme Court, and an unsatisfied litigant still has ample opportunity for ultimate review by the United States Supreme Court of the federal questions involved. *Fenner* v. *Boykins*, 271 U. S. 240. A three-judge federal court should not be used as a vehicle to enjoin future enforcement of state statutes, constitutional or otherwise. *Watson* v. *Buck, supra.*

Nor is the instant case similar to *Aelony* v. *Pace* and *Harris* v. *Pace*, Civil Actions No. 530 and 531 respectively, Middle District of Georgia, decided Nov. 1, 1963, — F. Supp. —, for those cases involved the enjoining of a threatened prosecution under the Georgia "Insurrection Statute" which has been held unconstitutional in its application in *Herndon* v. *Lowry*, 301 U. S. 242, and the "Unlawful Assembly Statute" which had just recently been held unconstitutionally vague in *Wright* v. *Georgia*, 373 U. S. 284.[2]

[2] It is significant to note that the *Herndon* and *Wright* cases both found their way to the United States Supreme Court via the state courts, and not by the flanking-movement to a three-judge federal district court.

The *Aelony* and *Harris* cases involved the purely unconstitutional situation of a defendant being held without bail for a misdemeanor.[3]

It was said by Mr. Justice Holmes in The Sacco-Vanzetti Case, Transcrip tof the Record 5516, that "[t]he relation of the United States and the Court of the United States is a very delicate matter that has occupied the thoughts of statesmen and judges for a hundred years and cannot be disposed of by a summary statement that justice requires me to cut red tape and to intervene."

This brings us first to the narrow question of supersession, that is, of whether the State of Louisiana can investigate, indict and prosecute for sedition, subversion, or communist activity directed against the state or local government.

First of all the statutes differ from the others found in Title 14 of the Louisiana Revised Statutes, better known as the Louisiana Criminal Code, in that the balance of the Code deals with the protection of the individual member of society, whereas, the statutes under consideration deal solely with the protection of the constitutional form of local government chosen collectively by all of the members of society.

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[3] The dissenting opinion, per Judge Elliott, correctly points out that the equity powers of a federal court should not be invoked to interfere by injunction with threatened criminal prosecutions in a state court. He further states that "* * * I would require the assessment of reasonable bail in those instances where no bail has been assessed. I would impinge no further upon the prerogatives of the state courts * * *." After stating that the constitutionality of the same statutes were then pending before the Supreme Court of Georgia, he continues: "* * * For us at this time to deal with the same questions about to be considered by the Supreme Court of the state strikes me as being an unwarranted interference with an embarrassment to the state court proceedings and a breach of those principles of comity historically governing the relations between the courts of the states and the courts of the United States."

Louisiana is not the only state in the Union with sedition or treason or subversive activities and communist control laws. [See Appendix C]

Pennsylvania v. *Nelson*, 350 U. S. 497 involved the first such statute to be subjected to constitutional interpretation. Defendant-Respondent Steve Nelson, an acknowledged communist, was convicted under Section 207 of the Pennsylvania Penal Code, commonly referred to as the Pennsylvania Sedition Act which proscribed sedition against the State of Pennsylvania *and* the United States. He was sentenced to imprisonment for twenty years and was ordered to pay a fine of $10,000.00 and to pay the costs of prosecution in the sum of $13,000.00. The Superior Court affirmed and the Supreme Court of Pennsylvania reversed on the narrow issue of supersession of the state law by the Federal Smith Act, 18 U. S. C. A. 2385.

The United States Supreme Court affirmed, "[s]ince we find that Congress has occupied the field to the exclusion of parallel state legislation, that the dominant interest of the federal government precludes state intervention, and that administration of state acts would conflict with the operation of the federal plan, we are convinced that the decision of the Supreme Court of Pennsylvania is unassailable." *Pennsylvania* v. *Nelson*, *supra*, at Page 509.

Thus it appeared that the federal government had completely pre-empted the field of sedition against the State and Federal Governments.[4] The question then arose as to whether the "exclusion of parallel state legislation precluded the state from protecting itself from sedition."[5]

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[4] The *Nelson* subsequently received critical comments of the prevailing view in various law journals. 6 AM U.L. Rev. 53; 6 De Paul L. Rev. 155; 30 So. Cal. L. Rev. 101; 10 Vanderbilt L. Rev. 144; 31 Washington L. Rev. 300.

[5] Subsequently and upon the strength of *Nelson*, the Louisiana Supreme Court declared an entire package of State Legislation on Communist Control as unconstitutional, see *State* v. *Jenkins*, 107 So. 2d 648.

That question was laid to rest in *Uphaus* v. *Wyman*, 326 U. S. 72:

> "In Nelson itself we said that the 'precise holding of the court * * * is that the Smith Act * * * which prohibits the knowing advocacy of the overthrow of the government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*' (350 U. S. at 499) The basis of Nelson thus rejects the notion that it stripped the States of the right to protect themselves. All the opinion proscribed was a race between federal and state prosecutors to the courthouse door. The opinion made clear that a state could proceed with *prosecutions* for sedition against the State itself; that it can legitimately investigate in this area follows a fortiori." (360 U. S. at 76) (Italics supplied)
>
> "Nor did our opinion in Nelson hold that the Smith Act has proscribed State activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' " (360 U. S. at 77)[6]

Thus it would appear that the state may validly proceed with prosecutions of sedition, treason, subversive activities and communist activities, carried on within the State and directed at the state alone.[7] It is unnecessary, therefore, and this Court will not pass on the constitutionality of the Communist Propaganda Control Law and will also leave

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[6] After the *Uphaus* decision the Louisiana Legislature enacted the statutes in question deleting the prohibitive language making it a crime to advocate the overthrow of the United States Government. Act 270 of 1962, RS 14:358-388.

[7] This is also the prevailing view expressed in a number of legal periodicals, e.g. 73 Harvard L. Rev. 163; 20 Louisiana L. Rev. 599; 28 Geo. Washington L. Rev. 461; 38 Texas L. Rev. 334.

to the State Courts the questions of unfounded search warrants and warrants of arrest, improper use by the Joint Legislative Committee of the documents allegedly improperly seized, etc.

If the action taken by this Court on January 10, 1964, is construed as validating the Communist Control Act as to its constitutionality this action is, of the Court's own motion, hereby vacated, the Court here refraining from taking any action in advance of appropriate proceedings in the State Courts at the State Level. All these matters we commit to the hands of the state criminal tribunals who are equally competent to conscientiously apply protected constitutional rights, subject, of course, to proper supervision by the State Appellate-level courts and the United States Supreme Court.

A very recent case dealing with the State's overriding and compelling interest and how it is affected by the Fourteenth Amendment is *Jordan* v. *Hutcheson*, 4 Cir. 323 F. 2d 597, wherein it was pointed out that:

> "When the court does act under the Fourteenth Amendment it must weigh the state's interest in the product of this effort against the interest of the citizen in his constitutional rights. Only if the state's interest is overriding and compelling will the courts condone an invasion of those rights for which the plaintiffs here seek protection." (Footnote omitted)

The case at bar presents one of the most basic and compelling interests that the state could have, *i.e.* the basic interest of self-preservation and the right to enforce this interest in a lawful manner, through its grand juries and district attorneys, the organic law of the state protecting it against subversion and treason where directed against the state alone.

Moreover, the *Jordan* case, *supra*, dealt with an injunction directed to a state legislative committee as distinguish-

able from the instant case which strikes at the very heart of the state's organic authorities dealing with law and order.

It has also been urged upon us that this very court has declared Louisiana Revised Statutes 14:385 as unconstitutional, *State* v. *NAACP*, 181 F. Supp. 37, probable jurisdiction noted, 364 U. S. 839; affirmed 366 U. S. 293. The Court would like to point out that that case involved the unconstitutional application of the statutes to the National Association for Advancement of Colored People, a valid, lawful, private activity. Whether or not these statutes may be constitutionally applied to an invalid, unlawful secret activity remains an open question which we likewise commit into the hands of the state tribunals.[8]

During the first hearing of the matter it was indicated that the court would hear the arguments on the motion to quash and on the constitutionality of the act insofar as the face of it was concerned. It was determined that if the Court should hold the statute constitutional on its face that there would be another hearing for the reception of evidence. A second hearing was held on the question of whether a full trial would be permitted to show unconstitutional application.

The Court is of the opinion that a hearing for the admission of evidence is not necessary where only questions of law are presented, and where plaintiff's allegations for the purpose of this motion are admitted to be true and would not either in law or in fact entitle him to injunctive relief. *Securities & Exchange Commission* v. *Groze*, 156 F. Supp. 544; *Schlosser* v. *Commonwealth Edison Company*, 7 Cir. 250 F. 2d 478, cert. den. 357 U. S. 906; Cf. *Sewell* v. *Pegelow*, 4 Cir. 291 F. 2d 196, and if a hearing reveals that plaintiff

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[8] See *People of the State of New York ex rel. Bryant* v. *Zimmerman*, 276 U. S. 63, wherein the Court held constitutional a similar statute curtailing the activities of the Ku Klux Klan stating that the First Amendment does not protect associations for unlawful purposes.

has not stated a claim upon which relief can be granted, and cannot state such a claim, the court may dispose of the case finally by dismissing the complaint. *Mast Foos & Company* v. *Stover Mfg. Co.*, 177 U. S. 485, and that is what this court proposes to do.

Plaintiffs argued vociferously that the Court should hold a special hearing for the reception of evidence that these statutes, if constitutional, have been unconstitutionally applied as to them. This court will not gainsay the rule that evidence has been frequently admitted to show unconstitutional application of statutes. *NAACP* v. *Alabama*, 357 U. S. 449; *Gates* v. *Little Rock*, 361 U. S. 516; *Louisiana* v. *NAACP*, 366 U. S. 293; *Gibson* v. *Florida*, 372 U. S. 539; *NAACP* v. *Button*, 371 U. S. 415; but here the very vitals of our constitutional system of government are on the line.

The reception of evidence is a double-edged blade. It will cut to the quick both ways. If plaintiffs are permitted to introduce evidence of an unconstitutional application of the statutes, respondents would certainly be entitled to follow with evidence that the individual plaintiff is a Communist and that the corporate plaintiff is a Communist-front organization, and that the statute, as applied, was a constitutional application. In effect, these litigants, plaintiffs, defendants and intervenors, would indulge in a Star Chamber proceeding with all the "folderol" and publicity attendant therewith.

For the good of all it is to be hoped that this case will reach the Supreme Court so that the matter of State-Federal relations in the judicial field may be clarified. If the federal district judges are to act as a police force to ride herd over state and municipal courts then we had best be so instructed and the matter for once and for all laid to rest along with a vital part of the state judicial system already weakened by a constant federal encroachment in both the statutory and judicial fields.

This country was nurtured to maturity by leaders who, in the nineteenth century, constantly alerted the people of this nation to the danger of giving preferential treatment to any one branch in our three-pronged governmental system over the other. Apprehension was expressed by Jefferson when he stated:

> "The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot, and in alarming advance, gaining ground step by step, and holding what it gains, is engulfing insiduously [sic] the [State] governments into the jaws of that which feeds them".
>
> Thomas Jefferson to Spencer Roane (1821).

We must stride forward at all times to purify our democracy but let it not be said that the judiciary functioning as both a court and a congress took away inherent rights from one group, religious, ethnic, etc., in our society in order to bestow it upon another. All should be treated alike.

The application for the injunction will be denied and the suit dismissed, each party to bear its own costs, for failure to state a claim upon which relief can be granted.

APPENDIX B

Dissenting Opinion of Circuit Judge John Minor Wisdom

WISDOM dissenting:

I respectfully dissent.

The main issue in this case is not, as the majority opinion declares, "the State's basic right of self-preservation". No one questions this right.

The main issue is whether the State[9] is abusing its legislative power and criminal processes: whether the State, under the pretext of protecting itself against subversion, has harassed and humiliated the plaintiffs and is about to prosecute them solely because their activities in promoting civil rights for Negroes conflict with the State's steel-hard policy of segregation. They ask the federal court to defend their federally protected rights.

The Court declined to act on the constitutional issues the case presents and refused the plaintiffs an opportunity to offer evidence in proof of their case.[10] It is not clear

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[9] The prime mover against the plaintiffs is the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature. The plaintiffs sued James H. Pfister, Chairman of that Committee, individually and as Chairman. The other defendants are Jimmie H. Davis, Governor of the State; Jack F. F. Gremillion, State Attorney General; James Garrison, District Attorney for the Parish of Orleans; Thomas D. Burbank, Commanding Officer of the State Police; and Russell R. Willie, a Major in the State Police. For convenience, the majority opinion speaks of all or some of these individuals when it uses the term "State." I do the same.

Also for convenience, "plaintiffs" includes "intervenors" and the Louisiana Anti-subversion Law refers both to R.S. 14:358-388, The Subversive Activities and Communist Control Law, and R.S. 390-390.5, the Communist Propaganda Control Law.

[10] The plaintiffs have offered the affidavits of Dr. Martin Luther King, Rev. Fred L. Shuttlesworth, Rev. C. T. Vivian, Dr. Herman Long, and Bishop Edgar A. Love. Ben Smith, Bruce Waltzer, Dr. Dombrowski and others are prepared to testify.

why it did. To me, the majority's decision appears to rest on a sort of visceral feeling that somehow, if relief were granted, the Court would be impinging on States' Rights.

The concept of the States as political bodies rather than administrative units of the national government tends to fractionate power, preserve regional differences, encourage home rule, and promote democracy at all levels of Government. These characteristics of American federalism are essential to the kind of government I want to live under. I say, however, with the Madison of the Constitutional Convention:

> "Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States * * * might enjoy a certain extent of power and be arrayed with certain dignities and attributes of power? * * * [*A*]*s far as the Sovereignty of the States cannot be reconciled with the happiness of the people, the voice of every good citizen must be. Let the former be sacrificed to the latter.*" (Emphasis added.)[11]

"States' Rights" are mystical, emotion-laden words. For me, as for most Southerners, the words evoke visions of the hearth and defense of the homeland and carry the sound of trumpets and the beat of drums. But the crowning glory of American federalism is not States' Rights. It is the protection the United States Constitution gives to the private citizen against *all* wrongful governmental invasion of fundamental rights and freedoms.

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[11] The Federalist, No. XLV.

Appendix B—Wisdom

When the wrongful invasion comes from the State, and especially when the unlawful state action is locally popular or when there is local disapproval of the requirements of federal law, federal courts must expect to bear the primary responsibility for protecting the individual.[12] This responsibility is not new. It did not start with the *School Segrega-*

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[12] "[T]he principal, if not the only, reason for establishment of the lower courts was the need for dealing with local opposition to, or disregard of, the federal law. Unless they perform this function adequately, there is little reason to have them at all * * *. And it is quite clear that the reason Congress was given such power, and presumably the basic reason for the existence of the federal courts which Congress did establish forthwith was the need for national tribunals to enforce the national law in the teeth of local resistance." Lusky, Racial Discrimination and the Federal Law: A Problem in Nullification, 63 Col. 1163, 178 (1963). Similarly, Mr. Justice Douglas, who must be in a state of shock at the thought that this Court quoted his opinion in England v. Louisiana State Board of Medical Examiners, 32 L.E. 4093, 4096, in support of the result reached here, said in that opinion: "Today we put federal jurisdiction in jeopardy. As the Court says there are many advantages in a federally constructed record. Moreover, federal judges appointed for life are more likely to enforce the constitutional rights of unpopular minorities than elected state judges * * *. The Court recognizes the value to the litigants of being in the federal court * * *. The value of the independence of federal judges, and the value of an escape from local prejudices when fact findings are made are considerable ones." Justice Douglas quoted Madison with regard to the problem when the creation of lower federal courts was being mooted: "What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court. An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive authority, was essential. A government without a proper executive and judiciary would be the mere trunk of a body, without arms or legs to act or move." 5 Elliott's Debates (Lipp. ed. 1941), p. 159.

tion Cases. It is close to the heart of the American Federal Union. It is implicit in the replacement of the Articles of Confederation by the Constitution. It makes federalism workable.

The distinguishing feature of this case, which the majority chooses to ignore, is the contention that the State, under the guise of combatting subversion, is in fact using and abusing its laws to punish the plaintiffs for their advocacy of civil rights for Negroes. It so happens that the plaintiffs contend that the Louisiana Anti-Subversion Law is unconstitutional and, besides, has been superseded by congressional legislation. If those contentions are sound, unquestionably the plaintiffs have a right to relief in the federal court. But the deep thrust of the complaint is the State's abuse of its power as to the plaintiffs. If the evidence on this point should support the plaintiffs, they would be entitled to relief—even if the law were clearly constitutional.

It is true that some law-violators, caught dead to rights, say "You can't do that to me", and shout "Civil Rights" in an effort to escape just punishment. But it is also true, and every judge in this circuit knows it, that in some cases, all too many cases, persons have been punished without any justifiable basis or punished cruelly beyond the bounds of just punishment for a minor offense, to serve as an object lesson to others, because they opposed the State's policy of segregation.[13] The plaintiffs assert that this is

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[13] On World-Wide Communion Sunday in October 1963 three young women, two of whom were Negroes, were arrested for attempting to attend religious services at a Methodist Church in Jackson, Mississippi. They got only as far as the church steps when they were told that they were not welcome. A policeman gave them two minutes to move on. As they started to walk away he told them that they had taken too long. He arrested them. They were indicted for violating Section 2090 (trespass) and Section 2406 (disturbing worship) of the Code of Mississippi. The Police Justice's Court of

such a case. There is, therefore, no substance to the majority's argument that the federal court is here being asked to interfere with orderly state criminal processes, and that if the Court granted relief it would be a precedent for interfering *every* time a criminal defendant protested that his constitutional rights were invaded. The processes under attack in this case are, allegedly, not the State's usual, orderly, impersonal, legislative and criminal processes.

This is a civil action which was brought *before* any criminal proceeding was begun in the state courts. There is therefore no unseemly clash of courts and no question of Section 2283 of the Judicial Code barring relief.[14] Assuming the truth of the complaint, as the Court *had* to do in order to dismiss the suit, the case is a classic example for raising the shield of the Constitution in protection of a citizen's constitutional rights. Congress recognized the problem in federal-state relations now before us and in the Civil Rights Act expressly authorized citizens to protect their constitutional rights by suing in the federal court.

If the Louisiana Anti-Subversion Law is invalid on its face or invalid as applied to the plaintiffs, they should not be subjected to the public indignity of prosecution, the paralysis of earning ability while their case is pending, and a long, expensive appeal through the state courts to the United States Supreme Court. These are foreseeable and

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Jackson sentenced them to a year's imprisonment and fined each $1,000. They removed the case to the Federal District Court for the Southern District of Mississippi on the ground that their civil rights were violated. The district judge remanded the action back to the State Court. Poole v. City of Jackson, 5th Cir. 1964, No. 21058, pending on appeal on the right to appeal.

[14] Ex parte Young, 209 U. S. 123 (1908); Truax v. Reich, 238 U. S. 33 (1915); Looney v. Eastern Texas R.R., 247 U. S. 214 (1918); American Houses v. Schneider, 211 F. 2d 881 (3rd Cir. 1954); Hart & Wechsler, The Federal Courts and the Federal System 847 (1953) Note, enjoining State Court Proceedings 74 Harv. L. Rev. 726, 729 (1961).

inevitable consequences of unlawful State action of the kind alleged here. Win, lose, or draw in the court of last resort—the individual citizen is a heavy loser when the State abuses its legislative power and criminal processes. The only adequate remedy is for the federal district court to stop the State at the start of its abuse of its governmental power. Whether the State is misusing its power can be determined only after a fair and full hearing. The logical forum for that determination is a federal tribunal.

This Court has jurisdiction. And as a three-judge Court it was instituted for just such a case. It should face up to the responsibilities incident to jurisdiction and to doing the job it was designed to do. Much as I regret to say it, and, of course, I mean no personal reflection on my colleagues, whom I esteem highly, I consider that this Court's refusal to pass on the constitutional issues and to give the plaintiffs a day in court is an indefensible denial of due process.

I turn now to a more detailed analysis of what the case is all about and how the Court has failed to meet its obligations as a federal district court.

I.

Is the Law Unconstitutional on Its Face?

A. The plaintiffs make two major contentions with respect to the *per se* unconstitutionality of the Louisiana Anti-Subversion Law. First, they contend that the statute violates the freedoms of speech, assembly, and association guaranteed by the First and Fourteenth Amendments. Second, they contend that the law is so vague and indefinite and completely without standards that it violates due process and constitutes an unlawful delegation of legislative power.

B. This Court held a long and formal hearing for the sole purpose of deciding the *per se* validity of the law. At

the end of the hearing the majority declared the law constitutional on its face. The Court has now reversed itself and, on the assumption that the plaintiffs will be prosecuted, shifted to the state courts responsibility for deciding the federal questions. *The majority opinion does not discuss any of the substantial constitutional issues the complaint raises.*

C. I shall not deal at length with the constitutional arguments, because of the Court's decision to finesse the subject.

Basically, everyone recognizes that the general scope of the statute is within the State's constitutional authority. The difficulty comes from the unlimited commands the statute imposes which conflict with individual rights of free speech and association. See *Gibson* v. *Florida Committee*, 1963, 372 U. S. 539, — S. Ct. —, — L. Ed. 2d —. One example will suffice to show the overbreadth of the statutory language. Section 359(2) defines "communist party" so as to include "any organization which in any manner advocates or acts to further the success of the program of world domination of the international communist conspiracy". This Court knows from other litigation, particularly *United States* v. *Louisiana*, E. D. La., Civil Action No. 2548, that the Louisiana legislature regards the movement to increase Negro voting in the State as part of the Communist conspiracy.[15] *All* of the organizations promoting increased Negro voting registration therefore fall within

[15] The "Key to Victory, A Manual of Procedure for Registrars of Voters, Police, Jurors and Citizens" is a pamphlet prepared by State Senator William M. Rainach and William M. Shaw. Senator Rainach was the first Chairman of Louisiana Joint Legislative Committee to maintain segregation and Mr. Shaw was the first counsel for the Committee. The pamphlet was used to instruct registrars. The pamphlet states and other evidence in the record indicates that "The Communists and the NAACP plan to register and vote every colored person of age in the South."

the definition of "communist party", and any member could be prosecuted under the Louisiana Anti-Subversion Law. The Supreme Court's words in *NAACP* v. *Button* are apt here:

> "It makes no difference whether such prosecutions or proceedings would actually be commenced. It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes. We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought. In such circumstances, a statute broadly curtailing group activity leading to litigation may easily become a weapon of oppression, however evenhanded its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens." *NAACP* v. *Button*, 371 U. S. 415, 83 S. Ct. 328, — L. Ed. —.

In the same case the Supreme Court also said:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchallenged delegation of legislative powers, but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."

"When, as in this case, the claim is made that particular legislative inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals, the courts are called upon to, and must, determine the permissibility of the challenged action."

Gibson v. *Florida Committee*, 372 U. S. 539. The constitutional attack affects many more sections of the law than those sections for violation of which the plaintiffs have been threatened with prosecution. The Court completely disregards this fact. The Court should have weighed the statute in the light of federal standards and decided constitutionality one way or the other. I would hold that some of the provisions of the law are unconstitutional on their face.

II.

IS THE LAW UNCONSTITUTIONAL AS APPLIED?

A. The intervenors, two practicing lawyers in New Orleans, have been active in civil rights cases, representing Negroes in many desegregation cases and representing the American Civil Liberties Union in all sorts of cases. They were arrested. At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's Journal. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrests resulted from "racial agitation". An able, experienced, and independent-minded district judge of the Criminal District Court for the Parish of Orleans, after hearing evidence, discharged the plaintiffs from arrest on grounds that the arrest warrants were improvidently issued and that there was no reasonable cause for the

arrests. Shortly thereafter, the Board of Governors of Louisiana State Bar Association adopted a resolution stating, in part:

> "The bar has a responsibility for safeguarding the principles which guarantee due process, and it is a deep concern where procedural or substantive aspects of search and seizure harass a member of the bar in the proper exercise of his duties.
>
> "Search and seizure of a file in a lawyer's office, unless due process has been adhered to in the strictest sense, is abhorred since such procedure endangers the exercise of constitutional rights of every lawyer and particularly the rights of the client who has placed his trust in him.
>
> "Specifically, this board would urge that police actions by any arm of government scrupulously conform to the best traditions of justice, which guarantee due process to every citizen." New Orleans Times-Picayune, January 3, 1964.

One of the intervenors is an officer of SCEF. The other lawyer is not even a member; he is threatened with prosecution for failing to register as a member of the National Lawyers' Guild.

The plaintiffs say that the purpose of the Southern Conference Educational Fund is to improve economic, social, and cultural standards in the South in accordance with the highest American institutions and ideals. Its principal activity is to promote civil rights for Negroes by education, correspondence, and publication of a newspaper. The plaintiffs deny any connection with communism or subversion.

As emphasized earlier, the plaintiffs contend that, even if the law is valid on its face, the State has searched their homes and offices, seized their property, arrested them, and

is about to prosecute them not because they are Communists —they deny any connection with communism—but because their thinking is not compatible with the State's segregation policy. The plaintiffs offer proof in the form of affidavits and witnesses willing to testify.

B. Here again the Court reversed itself. At the first hearing the Court agreed unanimously to receive the evidence at a second hearing. This makes sense. There is no way of deciding whether a law is applied unconstitutionally without hearing evidence as to its application. Evidence was also admissible to show the purpose, operation, and effect of the law. Now, however, the majority has refused to allow the plaintiffs to prove their case by affidavit or by witnesses.

The technical basis for the majority decision was its sustaining of the defendants' motion to dismiss on the ground that "the complaint failed to state a claim upon which relief can be granted". This motion, of course, requires the Court to accept as true all of the allegations in the complaint. In effect the Court held that a citizen has no cause or right of action against the State, to defend federally guaranteed rights and freedoms, when *admittedly* the State is using its Anti-Subversion Law against him, not because he is subversive, but because he advocates civil rights for Negroes. The Court never got around to stating just why the complaint is defective. The fact that the suit is against the State and its officers might affect judicial discretion to withhold the relief prayed for, but it does not affect the plaintiffs' right or cause of action.

Apparently uneasy because of its change of heart and desperately searching for an argument, any argument, the Court came up with a quiddity in keeping with its ratiocinations:

> "This court will not gainsay the rule that evidence has been frequently admitted to show un-

> constitutional application of statutes * * * ; but here the very vitals of our constitutional system of government are on the line * * *. If plaintiffs are permitted to introduce evidence * * * respondents would certainly be entitled to follow with evidence * * *. In effect, these litigants, plaintiffs, defendants and intervenors, would indulge in a Star Chamber proceeding with all the 'folderol' and publicly attendant therewith."

C. Disregarding the Star Chamber's "folderol" and publicity, I understand the Court concedes that in some cases evidence has been admitted to show an unconstitutional application of a valid law, but holds that in this case evidence should not be admitted because: (1) the "vitals" of our Constitution are on the line; (2) the plaintiffs should not be allowed to introduce evidence, for that would entitle the defendants to introduce evidence; (3) a hearing should not be public, or at any rate, a hearing should not be held if there is a likelihood of considerable publicity. This rationale illustrates what I mean by the suggestion, respectfully tendered, that perhaps the decision is the result of a visceral reaction.

In an analogous case, a different panel of this Court held that a section of this very law now before us was unconstitutional as it was applied to the National Association for Advancement of Colored People. *State* v. *NAACP*, E. D. La., 1960, 181 F. Supp. 37, *aff'd* 366 U.S. 293. "[T]he constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article [or person] is without reason * * *. *United States* v. *Caroline Products Co.*, 1938, 304 U. S. 144, 58 S. Ct. 778, 82 L. Ed. 1234." As Mr. Justice Holmes has said, "[T]he determination as to [the plaintiffs'] rights turns almost wholly upon the facts to be found * * *. All their constitutional rights, we repeat, depend

upon what the facts are found to be * * *. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent." *Prentis* v. *Atlantic Coast* Line Co., 1908, 211 U. S. 210, 29 S. Ct. 67, 53 L. Ed. 150.

All I know about the plaintiffs is what I have read about them in the pleadings and in their written offer of proof. Perhaps the plaintiffs are Communists or subversive; perhaps not. Perhaps the State is being falsely accused; perhaps not. I know this, however: the plaintiffs have a right to sue in the federal district court and fair play entitles them to a day in court to make their proof.

III.

Has the Louisiana Anti-Subversion Law Been Superseded by Congressional Laws on the Subject?

A. The plaintiffs say that, judging by the criteria established in *Pennsylvania* v. *Nelson*, 1956, 350 U. S. 497, 76 S. Ct. 477, 100 L. Ed. 640, Congress has superseded the Louisiana law through enactment of the Smith Act of 1940, as amended in 1948, 18 U. S. C. 2385, the Internal Security Act of 1950, 50 U. S. C. 761 *et seq.*, and the Communist Control Act of 1954; 50 U. S. C. 841. *Nelson* established three tests to show congressional intention to supersede state laws on subversion. Applying these tests to this case, the plaintiffs contend, first, that Congress has evidenced this intention by a pervasive, all-embracing program of regulation; second, that the Louisiana law is on a subject in which the national interest is so dominant that the federal system must be assumed to preclude enforcement of state laws on the same subject; third, that enforcement of the state law presents a serious conflict with the federal program.

Appendix B—Wisdom.

B. The majority opinion discusses this contention at length although, to have been consistent with its refusal to decide constitutionality, the Court should have refused to discuss supersession. There is no less, and no more, reason to decide one than the other. The Court never comes to grips with the tests *Nelson* establishes. Instead, the Court simply relies on *Uphaus* v. *Wyman,* 1959, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090, in which the Supreme Court stated that *Nelson* does not prohibit prosecution for sedition against the State itself or prevent the State from protecting itself from sabotage or attempted violence.

C. *Uphaus,* if I may say so, is of small help in our national efforts against Communism but it offers great prospects for disguising unlawful state action against federally protected rights. Nevertheless, the decision may be read as a logical and proper limitation on *Nelson* when the individuals prosecuted have in fact directed their activities against the State (not against the Nation), as in such incidents as riots, malicious mischief, criminal anarchism, or a conspiracy to dynamite the State house. Thus, there is no question as to the validity of the State Criminal Anarchy Law, La. R.S. 14:115. And the Louisiana Supreme Court very properly held that *Nelson* did not foreclose a prosecution under that statute "which does not necessarily involve seditious acts against the federal government". *State* v. *Cade,* 1963, 244 La. 534, 135 So. 2d 382. In the same decision, however, the Louisiana Supreme Court reaffirmed its holding in *State* v. *Jenkins,* 1958, 236 La. 300, 107 So. 2d 648.

In the *Jenkins* case the defendant was charged in a bill of information with violating an earlier version of the statute before this Court. The defendant was charged with being a member of the Communist Party knowing it to be a foreign subversive organization as defined in Section 366 of the statute. The prosecution argued that

Nelson merely foreclosed acts of sedition against the United States alone. The Louisiana Supreme Court rejected the prosecution's position:

> "This contention cannot be sustained. A reading of the majority opinion in the *Nelson* case leaves no doubt that the ruling covers the entire area of communist activity, since communism in any form, even though directed against a local government, necessarily violates the Smith Act. Thus, in the case at bar, the charge that the accused has been guilty of subversive activity, in that she was a member of the Communist Party, in its essence includes seditious acts against the government of the United States (even though such violation had not been specifically alleged), for our Communist Control Law (R.S. 14:358-365) like the Federal Communist Control Act, 50 U. S. C. § 841 *et seq.*, contains legislative declarations of fact that the Communist Party is dedicated to the overthrow of all organized government."

Uphaus upheld a contempt conviction of a witness for failure to produce a list of guests at a *public* summer camp suspected of being a communist front. The New Hampshire legislature had authorized the state attorney general to investigate the extent of subversive activities in the state. As the Supreme Court noted in *Gibson* v. *Florida Committee*: "[T]he claim to associational privacy in Uphaus was held to be 'tenuous at best', 360 U. S. at 80, since the disputed list was already a matter of public record by virtue of a generally applicable New Hampshire law requiring that places of accommodation, including the camp in question, maintain a guest register open to public authorities. Thus, this Court noted that the registration statute 'made public at the inception the association they

[the guests] now wish to keep private'. 360 U. S. at 81". 373 U. S. at 54.

I have no doubt of the validity of a state legislative investigation into the extent of communist or subversive activities within the state, provided that it is conducted with proper constitutional safeguards and does not impinge on areas preempted by Congress. Whether subversive persons are within a state, whether their activities constitute a threat to the state, and what kind of a threat are of proper concern to a State. Information relative to the subject is necessary for the State "to operate in areas not reached by federal authority". *Texas* v. *Southeast Texas Chapter*, 358 S. W. 2d 711. Thus *Uphaus* has been held to sanction state legislative inquiries into such local matters as the qualifications and fitness of the state's employees. *Baggett* v. *Bullett*, W. D. Wash. 1963, 215 F. Supp. 439, 448, app. pending. Here the legislation and the State's acts against the plaintiffs go much further than New Hampshire's investigation in *Uphaus*.

The Louisiana Anti-Subversion Law, unlike the Criminal Anarchy Law, is directed at the same conduct proscribed by Congress. This is evident from the language of the statute. Thus. Section 358 states that the purpose of the legislation is to seek to meet problems created by the "world Communist movement". The preamble declares that "there exists a world Communist movement, directed by the Union of Soviet Socialist Republics and its satellites which has as its objective world control." After describing in some detail the conduct of this "world Communist movement", the law states that "the world Communist movement constitutes a clear and present danger to the citizens of the State of Louisiana. The public good and the general welfare of the citizens of the state require the immediate enactment of this measure." This is precisely the "conduct" which Congress has proscribed in the federal legis-

lation. The preamble to the Internal Security Act, Title 50 § 781, in almost the identical language utilized by the Louisiana legislature, states that the purpose of the federal legislature is likewise to meet the problem of "conduct" engendered by the "world Communist movement".

In Section 358 the legislature explains the state's concern with the conduct proscribed: "Since the State of Louisiana is the location of many of the nation's most vital military establishments, and since it is a producer of many of the most essential products for national defense, the State of Louisiana is a most probable target for those who seek by force and violence to overthrow constitutional government, and is in immediate danger of Communist espionage, infiltration and sabotage." Thus the legislature's concern is with threats to the national interest and national security, with problems relating to the national defense and, indeed, with international relations.

In the years following the *Nelson* decision not a single state court criminal prosecution for alleged Communist activity has been sustained. See, for example, *Commonwealth* v. *Gilbert,* 1956, 334 Mass. 71, 134 N. E. 2d 13; *Braden* v. *Commonwealth,* 1953, 291 S. W. 2d 843 (Kentucky); *Commonwealth* v. *Hood,* 1956, 334 Mass. 76, 134 N. E. 2d 12; *Commonwealth* v. *Dolsen,* 1957, 183 Pa. Sup. 339, 132 A. 2d 692. These cases dealt with attempted enforcement of state sedition acts based upon charges that the defendants were engaged in communist activities or were members of communist organizations. Even where the charge was carefully *couched in terms of sedition against the state itself,* in applying the doctrines enunciated in *Nelson* the state courts uniformly held that charges of communist activity of necessity involved conduct proscribed by the federal legislation. For example, the Supreme Court of Massachusetts, in *Commonwealth* v. *Gilbert,* pointed out:

> "Although these things * * * are specified as pertaining to the overthrow of the government of this

Commonwealth, it is evident that they are the familiar paraphernalia of communist agitation for the overthrow of government in general, and cannot be directed separately and exclusively against the government of this Commonwealth."

These cases all dealt with criminal prosecutions under state sedition laws. However, the Supreme Court of Michigan, in *Albertson* v. *Millard*, 1956, 345 Mich. 519, 77 N. W. 2d 104, faced directly the impact of the preemption doctrine upon a state law similar to the Louisiana law before this Court. Following the passage of the federal Internal Security Act several states enacted so-called "Little McCarran Acts", principally among them Alabama, Louisiana, Michigan and Texas. These statutes are attempts to cover the areas governed by the Internal Security Act of 1950 and the Communist Control Act of 1954.

In *Albertson*, the Michigan Supreme Court struck down the Michigan Act on the ground that it was superseded by the existing federal legislation. The Court held that:

> "It is not necessary here to indulge in any extended or lengthy detailed comparison of the specific provisions of the Trucks Act with those of the Pennsylvania Act which the United States Supreme Court struck down in its entirety. No question has been raised here pointing to any substantial difference between the two."

Accordingly the Court ruled that:

> "The Congress of the United States has occupied the field entered by the Trucks Act to the extent that the federal act superseded the enforceability by the state of the provisions of said act."

Appendix B—Wisdom

In describing the impact of the Michigan decision upon the Alabama, Louisiana and Texas statutes, a recent commentator has written:

> "These statutes provide for registration of communist and subversive organizations, set out penalties for sabotage, and impose various disabilities upon registrants, such as exclusion from the ballot and from public office. Other states require registration but do not impose disabilities upon registrants. It is probable that most of the provisions of these statutes have been superseded by federal legislation. The registration statutes duplicate and enlarge the federal registration scheme. Nearly all of them differ from the federal scheme in one or more respects. Some are accompanied by provisions outlawing the Communist Party. Because of the probable conflict of provisions, there is a much clearer case for preemption with reference to these statutes than there is with respect to the sedition statutes invalidated by the *Nelson* case. Hines v. Davidowitz, in which the Federal Alien Registration Act of 1940 was held to supersede a Pennsylvania alien registration statute, provides a close analogy. Moreover, the breadth and thoroughness of the federal scheme make it easier to infer a preemptive intent on the part of Congress. It is not surprising that the Michigan Supreme Court in *Albertson* v. *Attorney General* held that Michigan's comprehensive communist control law had been superseded by the similar provisions of federal communist control measures." Cramton, Supreme Court and State Power to Deal with Subversion and Loyalty, 43 Minn. L. R. 1025, 1034.

The possibility of subversive activities affecting a state directly provides a basis for *bona fide* investigation and

state legislation. But prosecutions for sedition based on an accused being a communist or a member of a communist front organization have been preempted by Congress. The scheme of federal regulation of Communist activities is so pervasive, the national interest so dominant, and the possibility of federal-state conflict so great that "the conclusion is inescapable that Congress has intended to occupy [this] field of sedition." *Commonwealth* v. *Nelson*, at page 504. *Uphaus* reaffirmed Nelson; it did not overrule *Nelson*. As long as *Nelson* stands, a State may not define as a crime the same *conduct* Congress proscribes, even though the State's indictment is limited to sedition against the State. There is no doubt as to the intent of the Louisiana legislature: In Section 390 the legislature explains that the statute was necessary because "the federal legislation on this subject is either inadequate in its scope or not being effectively enforced".

IV.

Should the Court Proceed with the Trial of this Case and, on a Proper Showing, Enjoin Enforcement of the Law?

A. The plaintiffs contend that since the law is unconstitutional as written and applied, that a federal district court has the power to proceed with the trial and, on a proper showing, should enjoin the enforcement of the law. The enforcement of the law, they contend, threatens immediate and irreparable injury to their federally protected constitutional rights. The same argument would apply if the Court should hold that congressional legislation superseded the Louisiana Anti-Subversion Law.

B. The Court's position is unclear. The majority opinion states that the "instant case postulates the basic constitutional issue whether prosecution in the state courts

• • • may properly be blocked and effectively thwarted by Federal action". But this is not a constitutional question at all. There is not the slightest doubt as to the constitutional power of a federal court to block prosecution in a state court under an unconstitutional statute. We need look only to the Supremacy Clause to resolve any doubt. And Congress set up the three-judge court for the precise purpose of passing on whether a federal district court *should* enjoin enforcement of a state law. Moreover, whether the state law is a civil or criminal statute is immaterial in terms of constitutionality.

As emphasized, a basic error in the Court's decision is its failure to distinguish between the type of case now before it and the run of the mine suit by a criminal offender asking for relief against unlawful State action. In the Civil Rights Act Congress established a distinct federal cause of action in favor of those whose constitutional rights have been invaded. 42 U.S.C.A. 1981, 1983, 1985. As a matter of law, since such cases involve a federal question, the right existed anyway. The fact that such cases involve a dispute over federally protected freedoms makes the federal court the appropriate forum for settlement of the dispute.

Assuming some latitude for decision under the doctrine of abstention, now developing as nicely as if Dr. Frankenstein were in charge of it, there is still not enough latitude in the doctrine to justify abstention in this case. It is true that generally speaking federal courts are loath to intervene in orderly criminal processes of a State. They do so only in exceptional cases. But here, allegedly, instead of proceeding in an orderly and regular manner, the complaint charges that the State is subverting its Anti-Subversion Law by using it to punish advocates of civil rights.

Exceptional as this situation should be, there are enough cases now, I believe, for one to state that in this

circuit our courts have established the following principle:

> Federal courts are slow in interfering with criminal proceedings in the ordinary case; for example, to take an obvious case, when a defendant argues that state proceedings should be halted while the federal court considers the validity of a search and seizure. But when the complaint alleges that a man is about to suffer irreparable injury from the State for asserting his basic constitutional rights, federal courts are under a duty to hold a hearing on the complaint and to decide the issues. If the state law is unconstitutional as written or applied, or has been superseded by congressional legislation, the Court should enjoin the enforcement of the law, whether the statute is of a civil or a criminal nature.

C. (1) The landmark authority on the power of a federal court to enjoin state enforcement of a law impairing a federal protected right is *Ex Parte Young*, 1908, 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714, although recognition of such constitutional power goes back at least to *Osborn* v. *Bank of the United States*, 1824, 9 Wheat. 738, 6 L. Ed. 204. In *Ex Parte Young* the Supreme Court said:

> "[I]ndividuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, *either of a civil or criminal nature*, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

As noted in a recent treatise, "The effect of Ex Parte Young is * * * to subject the states to the restrictions of

the United States Constitution which they might otherwise be able safely to ignore. * * * [I]n perspective the doctrine of Ex Parte Young seems indispensable to the establishment of constitutional government and the rule of law." Wright, Federal Courts § 48 (1963).

Jordan v. *Hutcheson*, 4th Cir. 1963, 323 F. 2d 597 is instructive here. In that case three Negro attorneys sued a committee of the Virginia State Legislature, its Chairman, counsel, and a process server of the City of Norfolk. The complaint alleged that under the guise of conducting lawful investigations but actually for the purpose of discouraging Negroes from asserting their civil rights in the courts, the defendants harassed and attempted to intimidate the plaintiffs, raided their offices, and published statements (as in the instant case) naming the plaintiffs as law violators. In a thorough, carefully documented opinion, which relies on a great many decisions of this circuit, the Fourth Circuit reversed the district court which had held that the complaint failed to state a cause of action. Judge Bell, for a unanimous court, said:

> "The extent to which the state through its legislative power may intrude upon a citizen's rights becomes a matter for the consideration of the federal courts when such conduct invades the citizen's constitutional privileges. Whereupon the federal courts are commanded to act under the self-executing provisions of the Fourteenth Amendment. We submit it would be impracticable to test the constitutionality of the state's conduct without considering its purpose. * * * *The concept of federalism: i.e., federal respect for state institutions, will not be permitted to shield an invasion of the citizen's constitutional rights.* Baker v. Carr, 369 U. S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Certainly this

principle has not shielded the activities of the executive and judicial branches of the state from interdiction when constitutional rights are involved. * * * Although the federal courts will recognize and respect the state's right to exercise through its legislature broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights from invasion either by state action or under color thereof. ***Especially is this true in the sensitive areas of First Amendment rights and racial discrimination.*** Where there exists the clear possibility of an immediate and irreparable injury to such rights by state legislative action the federal courts have exercised their equitable powers including the declaratory judgment and the injunction." (Emphasis added.)

(2) Courts in this circuit have repeatedly enjoined the enforcement of state laws where enforcement infringed on federal rights. They have done so when the statute was unconstitutional on its face and when it was unconstitutional as applied. They have issued the injunction both before and after criminal prosecutions have been started.

In a strikingly analogous situation, in *Bush* v. *Orleans Parish School Board*, E. D. La. 1961, 194 F. Supp. 182, *aff'd* — U. S. —, a three-judge court, met directly the question of enjoining state court criminal proceedings and the enforcement of criminal statutes. Louisiana had enacted certain criminal laws designed in their operation, *but not on their face*, to deter Negro citizens from exercising their right to insist upon the desegregation of public education. The statutes created a new crime, "bribery of parents of children", and a companion crime, "intimidation and interfer-

ence in the operation of schools". As in the instant case, the Attorney General of the State argued that Section 2283 and the policy of comity prohibited the federal court from enjoining these criminal prosecutions. The Court, enjoining a large number of state officers from the Governor on down, said.

> "True, 'it is a familiar rule that courts of equity do not ordinarily restrain criminal prosecution' *Douglas* v. *Jeannette.* * * * But this rule cannot be applied mechanically. *NAACP* v. *Bennett*, cf. *Doud* v. *Hodge*, 350 U. S. 485. Special circumstances will sometimes compel a federal court to act. *Truax* v. *Reich* 239 U. S. 33; *Pierce* v. *Society*, 268 U. S. 510; *Hague* v. *CIO*, 307 U. S. 496. * * * This is such a case. * * * The challenged statutes are not ordinary criminal provisions. * * * Placed in context, their mission is all too clear. These are the invidious weapons of a state administration dedicated to scuttling the modest program of desegregation which has been initiated in Orleans Parish. * * * Constitutionally unable to require racial segregation in the public schools, arrested in its plan to close the integrated schools, and unsuccessful in its boycott of these schools by other means, the State has now marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club." 194 F. Supp. at 185.

In the most recent decision in point, *Aelony* v. *Pace*, Slip Opinion, Nov. 1, 1963, 32 L. W. 2215, Judge Tuttle, for a three-judge court held that a Georgia "insurrection statute" and an "unlawful assembly statute" were unconstitutional and granted an injunction forbidding prosecution of the plaintiffs under these laws. I point out that a state "insurrection" statute is preeminently a law en-

abling a State to protect itself against what the majority here calls the State's "basic right of self-preservation".

Browder v. *Gayle*, M. D. Ala. 1956, 142 F. Supp. 707, *aff'd per curiam* 352 U. S. 903, is a leading case. Judge Rives, for the Court, held:

> "The defendants, * * * [urge that] the Federal court * * * should, in its discretion as a court of equity, and for reasons of comity, decline to exercise such jurisdiction until the State courts have ruled on the construction and validity of the statutes and ordinances. The short answer is, that doctrine has no application where the plaintiffs complain that they are being deprived of constitutional civil rights, for the protection of which the Federal Courts have a responsibility as heavy as that which rests on the State courts."

Discussing *Browder* v. *Gayle* a panel of the Fifth Circuit (Chief Judge Hutcheson and Judges Tuttle and Jones) said, in a *per curiam* opinion:

> "That case disposes of the contention that the federal court should not grant an injunction against the application or enforcement of a state statute, the violation of which carries criminal sanctions. This is not such a case as requires the withholding of federal court action for reason of comity, since for the protection of civil rights of the kind asserted Congress has created a separate and distinct federal cause of action. 42 U. S. C. A. § 1983. Whatever may be the rule as to other threatend prosecutions, the Supreme Court in a case presenting an identical factual issue affirmed the judgment of the trial court in the Browder case in which the same contention was advanced. *To the extent that this is inconsistent with Douglas* v. *City of Jeannette, Pa.*, 319 U. S. 157,

63 S. Ct. 877, 87 L. Ed. 1324, we must consider the earlier case modified." *Morrison* v. *Davis*, 5 Cir. 1958, 252 F. 2d 102, at 103.

In *United States* v. *Wood*, 5 Cir. 1961, 295 F. 2d 772 a Registrar of Voters in a Mississippi County where there were no Negroes registered, without provocation, pulled out his revolver and ordered a Negro to leave his office. As he was leaving, the Registrar struck him on the back of his head with the revolver. The Negro had conducted a school for voting registration and had encouraged Negroes to register. He was charged with disturbing the peace. The Court of Appeals for this Circuit enjoined his prosecution not just on the violation of his rights but on the ground that the prosecution, "regardless of outcome, will effectively intimidate Negroes in the exercise of their right to vote". 295 F. 2d at 777. The Court pointed out that the Civil Rights Act, 42 U. S. C. A. 1971 expressly authorized injunctive relief against state criminal court proceedings and thus falls squarely within the stated exception to Section 2283. See also *Cooper* v. *Hutchinson*, 3rd Cir. 1958, 184 F. 2d 119, holding that 42 U. S. C. A. 1983 authorizes an injunction against state court proceedings as an exception to Section 2283.

In *City of Houston* v. *Dobbs Co.*, 5th Cir. 1956, 232 F. 2d 428, the Court affirmed the granting of permanent injunctive relief against the enforcement of a criminal ordinance of the City of Houston. Judge Tuttle, for the Court, said:

> "Appellant attacks the jurisdiction of the Court on the well recognized principle that courts will not normally enjoin the enforcement of criminal statutes or ordinances whose constitutionality is challenged. There is an equally well recognized exception to this rule as stated in the case cited by the appellant in

its brief, *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89 where the Court says, 'to justify such interference there must be exceptional circumstances and a clear showing that an injunction is necessary to afford adequate protection of constitutional rights. The case before us presents a clear illustration of such exceptional circumstances as would make the general rule inapplicable''.

See also *Denton* v. *City of Carrollton, Georgia*, 5 Cir. 1956, 235 F. 2d 481.

Moreover, as the Court held in *Bailey* v. *Patterson*, 5 Cir. 1963, 323 F. 2d 201, "The law is crystal clear that they were not required to subject themselves to arrest in order to maintain this suit". In *McNeese* v. *Board of Education*, 373 U. S. 668, the Supreme Court reviewed the purposes of Section 1983. The Court found that these were its purposes: to override certain kinds of state laws; to provide a remedy where state law was inadequate; to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice; and to provide a remedy in the federal courts supplementary to any remedy any state might have. The Supreme Court said: "We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court". 373 U. S. at 672.

3 None of the decisions relied on in the majority opinion, present the all-important issue raised here that the State was subverting its laws in order to maintain its segregation policy.

In *Watson* v. *Buck*, 1940, 313 U. S. 387, 401, the Court stated that "exceptional circumstances" and "great and immediate" danger were not shown. *Stefanelli* v. *Minard*, 1951, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138, was a run of the mine case in which a defendant asked that a federal

court intervene in a state proceeding by suppressing the use of evidence allegedly secured by an unlawful search and seizure. The Court properly refused to interfere, particularly influenced by the consideration that it would be "interven[ing] piecemeal to try collateral issues". 342 U. S. at 123. In *Cleary* v. *Bolger*, 1963, 371 U. S. 392, 83 S. Ct. 385, 9 L. Ed. 2d 390, the Court held that federal courts would not enjoin New York police officers from testifying where there was no evidence of an attempt to avoid federal requirements. The majority opinion cites *Douglas* v. *City of Jeannette, Pa.*, 319 U. S. 157, 63 S. Ct. 877, 87 L. Ed. 1324, but as stated in *Morrison* v. *Davis*, 1958, 252 F. 2d 102, 103, the Fifth Circuit gives that case a narrow reading in civil rights cases.

In short, the many decisions in this circuit in which the Court has firmly grasped the nettle argue strongly against the Court's too tender handling of the case.

V.

Chairman Pfister is quoted as saying that the plaintiffs were racial agitators. If that is true, and if the plaintiffs' modest agitation by mail was motivated only by the plaintiffs' interest in civil rights for Negroes, then, once again, as in *Bush* v. *Orleans Parish School Board*, the State has "marshalled the full force of its criminal law to enforce its social philosophy through the policeman's club". Under any rational concept of federalism the federal district court has the primary responsibility and the duty to determine whether a state court proceeding is or is not a disguised effort to maintain the State's unyielding policy of segregation at the expense of the individual citizen's federally guaranteed rights and freedoms.

This Court should get on with its work.

APPENDIX C

Statutes Involved

LOUISIANA REVISED STATUTES

14:358 through 14:388

Sec. 358. Subversive Activities and Communist Control Law; Declaration of Public Policy

In the interpretation and application of R. S. 14:358 through R. S. 14:374 the public policy of this state is declared to be as follows:

There exists a world communist movement, directed by the Union of Soviet Socialist Republics and its satellites, which has as its declared objective world control. Such world control is to be brought about by aggression, force and violence, and is to be accomplished in large by infiltrating tactics involving the use of fraud, espionage, sabotage, infiltration, propaganda, terrorism and treachery. Since the state of Louisiana is the location of many of the nation's most vital military establishments, and since it is a producer of many of the most essential products for national defense, the state of Louisiana is a most probable target for those who seek by force and violence to overthrow constitutional government, and is in imminent danger of communist espionage, infiltration and sabotage. Communist control of a country is characterized by an absolute denial of the right of self-government and by the abolition of those personal liberties which are cherished and held sacred in the state of Louisiana and in the United States of America. The world communist movement constitutes a clear and present danger to the citizens of the state of Louisiana. The public good, and the general welfare of the citizens of this state require the immediate enactment of this measure. Acts 1962, No. 270, Sec. 1.

Appendix C—Statutes Involved

SEC. 359. DEFINITIONS

(1) A "Communist" means a person who is a member of the Communist Party or is proven to be substantially under the discipline and control of the International Communist Conspiracy.

(2) The "Communist Party" means the Communist Party, U. S. A., or any of its direct successors and shall include any other organization which is directed, dominated or controlled by the Soviet Union, by any of its satellite countries or by the government of any other communist country; or any organization which in any manner advocates or acts to further the success of the program of world domination of the international communist conspiracy.

(3) "Communist Front Organization" shall, for the purpose of this act include any communist action organization, communist front organization, communist infiltrated organization or communist controlled organization and the fact that an organization has been officially cited or identified by the Attorney General of the United States, the Subversive Activities Control Board of the United States or any Committee or Subcommittee of the United States Congress as a communist organization, a communist action organization, a communist front organization, a communist infiltrated organization or has been in any other way officially cited or identified by any of these aforementioned authorities as a communist controlled organization, shall be considered presumptive evidence of the factual status of any such organization.

(4) "Organization" means an organization, corporation, company, partnership association, trust, foundation, fund, club, society, committee, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

(5) "Subversive organization" means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy, or to assist in the overthrow or destruction of the constitutional form of the government of the state of Louisiana, or of any political subdivision thereof by revolution, force, violence or other unlawful means, or any other organization which seeks by unconstitutional or illegal means to overthrow or destroy the government of the state of Louisiana or any political subdivision thereof and to establish in place thereof any form of government not responsible to the people of the state of Louisiana under the Constitution of the state of Louisiana.

(6) "Foreign subversive organization" means any organization, directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy, or to assist in the overthrow or destruction of the constitutional form of the government of the state of Louisiana, or of any political subdivision thereof to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

(7) "Foreign Government" means the government of any country, nation or group of nations other than the government of the United States of America or one of the states thereof.

(8) "Subversive person" means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commis-

sion of any act intended to overthrow, destroy, or to assist in the overthrow or destruction of the constitutional form of the government of the state of Louisiana, or any political subdivision thereof by revolution, force, violence or other unlawful means; or who is a member of a subversive organization or a foreign subversive organization. Acts 1962, No. 270, Sec. 1.

Sec. 360. Registration of Communists

A. Each person remaining in this state for as many as five consecutive days after July 30, 1962, who is a communist or is knowingly a member of a communist front organization, shall register with the department of public safety of the state of Louisiana on or before the fifth consecutive day that such person remains in this state; and, so long as he remains in this state, shall register annually with said department between the first and fifteenth day of January.

B. Registration shall be under oath and shall set forth the name (including any assumed name used or in use), address, business occupation, purpose of presence in the state of Louisiana, sources of income, place of birth, places of former residence, and features of identification, including fingerprints of the registrant; organizations of which registrant is a member; and any other information requested by the department of public safety which is reasonably relevant to the purpose of R. S. 14:358 through R. S. 14:374.

C. Under order of any court of record, the registration records shall be open for inspection by any person in whose favor such order is granted; and the record shall at all times, without the need for a court order, be open for inspection by any law enforcement officer of this state, of the United States or of any state or territory of the United States. At the discretion of the department of public

safety, these records may also be open for inspection by the general public or by any member thereof. Acts 1962, No. 270, Sec. 1.

Sec. 361. COMMUNIST PARTY NOT TO APPEAR ON ELECTION BALLOTS

The name of any communist or of any nominee of the communist party shall not be printed upon any ballot used in any primary or general election in the state or in any political subdivision thereof. Acts 1962, No. 270, Sec. 1.

Sec. 362. PUBLIC OFFICE; DISQUALIFICATION OF COMMUNISTS

No person may hold any non-elective position, job or office for the state of Louisiana, or any political subdivision thereof, where the remuneration of said position, job or office is paid in whole or in part by public moneys or funds of the state of Louisiana, or of any political subdivision thereof, where the evidence shows such person to be a communist or a knowing member of a communist front organization. Acts 1962, No. 270, Sec. 1.

Sec. 363. ENFORCEMENT

The attorney general of the state of Louisiana, all district and parish attorneys, the department of public safety, and all law enforcement officers of this state shall each be charged with the duty of enforcing the provisions of R. S. 14:358 through R. S. 14:374. Acts 1962, No. 270, Sec. 1.

Sec. 364. ACTS PROHIBITED

It shall be a felony for any person knowingly and willfully to

(1) Commit, attempt to commit, or aid in the commission of any act intended to overthrow or destroy, or to

assist in the overthrow or destruction of the constitutional form of government of the state of Louisiana, or any political subdivision thereof, by revolution, force, violence, or other unlawful means, or

(2) Advocate, abet, advise, or teach by any means any person to commit, attempt to commit, or assist in the commission of any such act under such circumstances as to constitute a clear and present danger to the security of the state of Louisiana, or of any political subdivision thereof, or,

(3) Conspire with one or more persons to commit any such act;

(4) Assist in the formation or participate in the management or to contribute to the support of any subversive organization or foreign subversive organization knowing said organization to be a subversive organization or a foreign subversive organization; or

(5) Destroy any books, records, or files, or secrete any funds in this state of a subversive organization or a foreign subversive organization, knowing said organization to be such; or

(6) To become or to remain a member of a subversive organization or a foreign subversive organization knowing said organization to be a subversive organization or foreign subversive organization; or

(7) Fail to register as required in R. S. 14:360 or to make any registration which contains any material false statement or omission. Acts 1962, No. 270, Sec. 1.

Sec. 365. PENALTIES

Any person convicted of violating any of the provisions of R. S. 14:364 shall be fined not more than ten thousand dollars or imprisoned at hard labor for not more than ten years, or both. Acts 1962, No. 270, Sec. 1.

Sec. 366. Additional Penalties

Any person convicted by a court of competent jurisdiction of violating any of the provisions of R. S. 14:358 through 14:374 in addition to all other penalties therein provided shall from the date of conviction be barred from:

(1) Holding any office, elective or appointive, or any other position of profit or trust in or employment by the government of the state of Louisiana or of any agency thereof or of any parish, municipal corporation or other political subdivision of said state;

(2) Filing or offering for election to any public office in the state of Louisiana; or

(3) Voting in any election in this state. Acts 1962, No. 270, Sec. 1.

Sec. 367. Dissolution of Subversive Organizations; Forfeiture of Charter; Seizure of Books and Records

It shall be unlawful for any subversive organization or foreign subversive organizations to exist or function in the state of Louisiana and any organization which by a court of competent jurisdiction is found to have violated the provisions of this Section shall be dissolved, and if it be a corporation organized and existing under the laws of the state of Louisiana a finding by a court of competent jurisdiction that it has violated the provisions of this Section shall constitute legal cause for forfeiture of its charter and its charter shall be forfeited, and all funds, books, records and files of every kind and all other property of any organization found to have violated the provisions of this Section shall be seized by and for the state of Louisiana, the funds to be deposited in the state treasury and the books, records, files and other property to be turned over

to the department of public safety of Louisiana. Acts 1962, No. 270, Sec. 1.

Sec. 368. Judge's Charge to Grand Jury

The judge of any court exercising general criminal jurisdiction, when in his discretion it appears appropriate, or when informed by the attorney general or district attorney that there is information or evidence of violations of the provisions of this act to be considered by the grand jury, shall charge the grand jury to inquire into violations of R. S. 14:358 through 14:374 for the purpose of proper action, and further to inquire generally into the purposes, processes, and activities and any other matters affecting communism or any related or other subversive organizations, associations, groups or persons. Acts 1962, No. 270, Sec. 1.

Sec. 369. Ineligibility of Subversive Person for Public Office or Employment

No subversive person, as defined in R. S. 14:359, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government of, or in the administration of the business of this state, or of any parish, municipality, or other political subdivision of this state. Acts 1962, No. 270, Sec. 1.

Sec. 370. Screening of Prospective Public Officials and Employees

Every person and every board, commission, council, department, court or other agency of the state of Louisiana or any political subdivision thereof, who appoints, employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain,

before any person, including teachers and other employees of any public educational institution in this state, is appointed or employed, that he is not a subversive person, and that there are no reasonable grounds to believe such person is a subversive person. In the event reasonable grounds exist, he shall not be appointed or employed. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written affidavit containing answers to such inquiries as may be reasonably material. Acts 1962, No. 270, Sec. 1.

Sec. 371. Exceptions to Screening Requirements

The inquiries prescribed in R. S. 14:370, other than the written statement to be executed by an applicant for employment, shall not be required as a pre-requisite to the employment of any persons in the classification of laborers in any case in which the employing authority shall in his or its discretion determine, and by rule or regulation specify the reason why the nature of the work to be performed is such that employment of persons as to whom there may be reasonable grounds to believe that they are subversive persons as defined in R. S. 14:359, will not be dangerous to the health or security of the citizens or the security of the government of the state of Louisiana, or any political subdivision thereof. Acts 1962, No. 270, Sec. 1.

Sec. 372. Sufficiency of Grounds for Discharge from Office or Position; Effect of Civil Service Laws

Reasonable grounds to believe that any person is a subversive person, as defined in R.S. 14:359, shall be cause for discharge from any appointive office or other position of profit or trust in the government of or in the administration of the business of this state, or of any parish, municipality or other political subdivision of this state, or any agency thereof. The appropriate civil service com-

mission or board shall, by appropriate rules or regulations, prescribe that persons charged with being subversive persons, as defined in R.S. 14:359, shall be accorded notice and opportunity to be heard, in accordance with the procedures prescribed by law for discharges for other reasons. Every person and every board, commission, council, department, or other agency of the state of Louisiana or any political subdivision thereof having responsibility for the appointment, employment or supervision of public employees shall establish rules or procedures similar to those required herein for classified services for a hearing for any person charged with being a subversive person, as defined in R.S. 14:359, after notice and opportunity to be heard. Every employing authority discharging any person pursuant to any provision of R.S. 14:358-14:374 shall promptly report to the department of public safety the fact of and the circumstances surrounding such discharge. Acts 1962, No. 270, Sec. 1.

Sec. 373. Candidates for Public Office; Filing of Non-Subversive Affidavits

No persons shall become a candidate nor shall be certified by any political party as a candidate for election to any public office created by the constitution or laws of this state unless such candidate or certification by the political party shall have attached to the qualifying papers, the nominating petition or nominating papers filed with the appropriate party committee of this state or the Secretary of State, whichever the case may be, a sworn affidavit that the candidate is not and never has been a subversive person as defined in R.S. 14:359. No qualification of candidates, nominating petition or nominating papers for such office shall be received for filing by the official aforesaid unless the same are accompanied by the affidavit, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or re-

fused to make the required affidavit. Acts 1962, No. 270, Sec. 1.

Sec. 374. Citation of Subversive Activities and Communist Control Law

R.S. 14:358 through R.S. 14:374 may be cited as the Subversive Activities and Communist Control Law. Acts 1962, No. 270, Sec. 1.

Secs. 14:375, 14:376. Deleted

Secs. 14:377-14:380. Repealed. Acts 1962, No. 270, Sec. 1

Sec. 385. Organizations Engaged in Social, Educational or Political Activities; Communist Affiliations Prohibited

Non-trading corporations, partnerships and associations of persons operating in the state of Louisiana and engaged in social, educational or political activities are prohibited from being affiliated with any foreign or out of state non-trading corporations, partnerships or associations of persons, any of the officers or members of the board of directors of which are members of Communist, Communist-front or subversive organizations, as cited by the House of Congress un-American Activities Committee, or the United States Attorney. Reports or information from the files of the Committee on un-American Activities of the U. S. House of Representatives shall constitute prima facie evidence of such membership in said organizations. Acts 1958, No. 260, Sec. 1.

Sec. 386. Affidavits

As a condition precedent to being authorized to operate or conduct any activities in the state of Louisiana, every non-trading corporation, partnership or association of per-

sons engaged in social, educational or political activities, affiliated with any similar non-trading corporation, partnership or association of persons, chartered, created or operating under the laws of any other state, shall file with the secretary of state yearly, on or before December 31, an affidavit attesting to the fact that none of the officers of such out of state or foreign corporation, partnership or association of persons with which it is affiliated, is a member of any such organization cited by the House of Congress un-American Activities Committee, or the United States Attorney General, as Communist, Communist-front or subversive. Acts 1958, No. 260, Sec. 2.

Sec. 387. Failure to File Affidavit; Penalty

Failure to file the affidavit required by R.S. 14:386 shall constitute a misdemeanor, and the officers and members of such non-trading corporation, partnership or association of persons operating in this state and affiliated with such out of state or foreign organizations, failing to file such affidavit, shall be deemed guilty of a misdemeanor and upon conviction by a court of competent jurisdiction shall be fined $100.00 and imprisoned 30 days in the parish jail. Acts 1958, No. 260, Sec. 3.

Sec. 388. False Statements in Affidavit as Perjury

Any false statement under oath contained in the affidavit required by R.S. 14:386 filed with the secretary of state shall constitute perjury and shall be punished as provided by R.S. 14:123. Acts 1958, No. 260, Sec. 4.

Appendix C—Statutes Involved

Louisiana Revised Statutes 14:390 through 14:390.5

Sec. 390. Declaration of Public Policy

In the interpretation and application of R.S. 14:390 and the Sub-sections thereof, and as a result of certain evidence having been presented to the Joint Legislative Committee on Un-American Activities of this Legislature, the public policy of this state is declared to be as follows:

There exists a clear, present and distinct danger to the security of the state of Louisiana and the well-being and security of the citizens of Louisiana arising from the infiltration of a significant amount of communist propaganda into the state. In addition, this state is a stopping place or "way station" for sizeable shipments of dangerous communist propaganda to the rest of the United States and to many foreign countries.

The danger of communist propaganda lies not in its being "different" in the philosophy it expresses from the philosophy generally held in this state and nation, but instead in the fact that it is a specific tool or weapon used by the communists for the express purpose of bringing about the forcible total destruction or subjugation of this state and nation and the total eradication of the philosophy of freedom upon which this state and nation were founded. "Words are bullets" and the communists know it and use them so. Whatever guarantees of sovereignty and freedom are enjoyed by this state and its citizens are certain to vanish if the United States of America is destroyed or taken over by propaganda infiltration or otherwise against the United States is and should rightly be considered an attack upon or clear and present danger to the state of Louisiana and its citizens. Such attacks should therefore be the subject of concurrent jurisdiction through remedial legislation such as is now in effect on both the state and

federal level concerning such dangers as the narcotics traffic, bank robbery, kidnapping, etc. We hereby declare that the danger of communist propaganda infiltration is even greater than the danger from narcotics, pornographic literature, switch blade knives, burglar tools or illicit alcohol in dry jurisdictions, all of which have been the subject of valid statutory regulation by the States within the constitutional framework. The federal legislation on this subject matter is either inadequate in its scope, or not being effectively enforced, as much communistic propaganda material unlabeled and unidentified as such, is in fact entering the state of Louisiana at this time.

We further declare that communist propaganda, properly identified in terms similar to those used in the Foreign Agents Registration Act of the United States, is hereby identified as illicit dangerous contraband material. We further declare that certain exemptions hereinafter provided are for the purpose of allowing bona fide students of foreign languages, foreign affairs or foreign political systems, other interested individuals, and also bona fide educational institutions, to obtain this contraband upon specifically requesting its delivery for the purpose of person or institutional use in the due course of the educational process. We do not believe that the possession or use of such material by knowing and informed individuals for their personal use is any significant danger, and in fact it might be of some benefit in informing such individuals of the cynical and insidious nature of the communist party line. In view of these facts and so that any user of such materials will be adequately forewarned, we declare that all such material in any way entering the state of Louisiana should be required to be clearly labeled as communist propaganda as hereinafter provided. Added Acts 1962, No. 245, Sec. 1.

Appendix C—Statutes Involved

Sec. 390.1 Definition of Communist Propaganda

(1) "Communist propaganda" means any oral, visual, graphic, written, pictorial or other communication which is issued, prepared, printed, procured, distributed or disseminated by the Soviet Union, any of its satellite countries, or by the government of any other communist country or any agent of the Soviet Union, its satellite countries or any other communist country, wherever located, or by any communist organization, communist action organization, communist front organization, communist infiltrated organization, or communist controlled organization or by any agent of any such organization, which communication or material from any of the above listed sources is

(a) reasonably adopted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any way influence a recipient or any section of the public with reference to the political or public interests, policies or relations of a government of a foreign country or a foreign political party, or promote in the United States or the state of Louisiana, any attitude or state of mind that tends to undermine the determination of any citizen of the United States or of any of the various states to uphold and defend the Constitution of the United States or the constitutions of the respective states, or tends to create or encourage disrespect for duly constituted legal authority, either federal or state, or

(b) which advocates, advises, instigates or promotes any racial, social, political or religious disorder, civil riot, or other conflict involving the use of force or violence in the United States, the state of Louisiana or any other American republic, or the overthrow of any government or political subdivision of the United States, the state of

Louisiana or any other American republic by any means involving the use of force or violence.

(2) For the purposes of R.S. 14:390-14:390.8, the fact that an organization has been officially cited or identified by the attorney general of the United States, the subversive activities control board of the United States or any committee of the United States Congress as a communist organization, a communist action organization, a communist front organization or a communist infiltrated organization or has been in any other way officially cited or identified by any of these aforementioned authorities as a communist controlled organization, shall be considered presumptive evidence of the factual status of any such organization. Added Acts 1962, No. 245 Sec. 1.

Sec. 390.2 Acts Prohibited

It shall be a felony for any person to knowingly, willfully and intentionally deliver, distribute, disseminate or store communist propaganda in the state of Louisiana except under the specific exemptions hereinafter provided. Added Acts 1962, No. 345, Sec. 1.

Sec. 390.3 Legitimate Procurement of Contraband

Bona fide students of foreign languages, foreign affairs, or foreign political systems, other interested individuals, and also bona fide officially accredited educational institutions may obtain communist propaganda and have the same legally delivered to them within the state of Louisiana upon specifically requesting the delivery of the same for the purpose of personal or institutional use in due course of the educational process. All such communist propaganda legally entering this state under this exemption shall be clearly and legibly labeled on both the front and back cover thereof, or on the front if not covered, with the words

"Communist Propaganda" printed or stamped conspicuously in red ink, and failure to so label said material shall constitute a violation of R.S. 14:390-14:390.8 on the part of the sender or distributor thereof, the violation to be considered to take place at the point of actual delivery to the ultimate user who requested the material. Added Acts 1962, No. 245, Sec. 1.

Sec. 390.4 Venue

Violations of R.S. 14:390-14:390.8 are considered to take place at the location where the prohibited contraband material is found, either stored in bulk or placed in the hands of the ultimate user. Added Acts 1962, No. 245, Sec. 1.

Sec. 390.5 Warehousing and Storage

It is the duty of the sheriffs of the respective parishes, upon the finding of any bulk storage of any communist propaganda, to enter upon the premises where the material is found, clear the premises of all human occupants, and padlock the premises until judicially ordered to reopen them. The owner of any padlocked premises may, upon application to the district court of proper jurisdiction and upon showing the court that the premises can be immediately cleared of the prohibited contraband material, obtain an order from the court to the sheriff, authorizing him to supervise the removal of the contraband by the owner of the premises and to re-open the premises thereafter. Added Acts 1962, No. 245, Sec. 1.

Sec. 390.6 Destruction of Contraband

All communist propaganda discovered in the state of Louisiana in violation of R.S. 14:390-14:390.8 shall be seized and after proper identification and upon summary order of

the district court of proper jurisdiction, destroyed, unless needed for official purposes. Added Acts 1962, No. 245, Sec. 1.

Sec. 390.7 PENALTIES

Any person who violates any of the provisions of R. S. 14:390-14:390.6 shall be fined not more than ten thousand dollars or imprisoned at hard labor for not more than six years, or both. Added Acts 1962, No. 245, Sec. 1.

Sec. 390.8 SHORT TITLE

R.S. 14:390 through 14:390.7 may be cited as the "Communist Propaganda Control Law." Added Acts 1962, No. 245, Sec. 1.

APPENDIX D

Indictments Returned Against Appellants Dombrowski, Smith and Waltzer

Indictment of Benjamin E. Smith

PARISH OF ORLEANS

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

THE STATE OF LOUISIANA } SS.:

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one BENJAMIN E. SMITH late of the Parish of Orleans on the 22nd day of January in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans while knowingly and wilfully being a member of a Communist front organization known as the National Lawyers Guild, which said organization has been cited by committees and sub-committees of the United States Congress as a Communist front organization on March 29, 1944, September 21, 1950 and on April 23, 1956, and while at the same time remaining continuously within the boundaries of the State of Louisiana five consecutive days immediately prior to and on the date of the 22nd day of January 1964, and that during such time he did knowingly and wilfully fail to register with the Department of Public Safety of the State of Louisiana as a member of a Communist front organization on or before the fifth day that he remained continuously in this State, all as required by Louisiana Revised Statutes Title 14, Section 360.

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SECOND COUNT

AND NOW THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one BENJAMIN E. SMITH late of the Parish of Orleans on the 22nd day of January in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans knowingly and wilfully participate in the management, to wit, act as Treasurer of a subversive organization, to wit, the Southern Conference Educational Fund, said organization being essentially the same as the Southern Conference for Human Welfare, which said organization has been cited by committees of the United States Congress as a Communist front organization on March 29, 1944, and June 16, 1947, while knowing the said Southern Conference Educational Fund to be a subversive organization.

THIRD COUNT

AND NOW THE SAID GRAND JURORS of the State of Lousiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of said State, upon their oath, PRESENT That one BENJAMIN E. SMITH late of the Parish of Orleans on the 22nd day of January in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and with the jurisdiction of the Criminal District Court for the Parish of Orleans while knowingly and wilfully being a member of a Communist front organization known as the Southern Conference Educational Fund, which said organization is essentially the same as the Southern Conference for Human Welfare, which said

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Southern Conference for Human Welfare having been cited by the committees of the United States Congress as a Communist front organization on March 29, 1944, and on June 16, 1947, while at the same time remaining within the boundaries of the State of Louisiana five consecutive days immediately prior to and on the date of the 22nd day of January 1964, and that during such time he did knowingly and wilfully fail to register with the Department of Public Safety of the State of Louisiana as a member of a Communist front organization on or before the fifth day that he remained in this State, all as required by Louisiana Revised Statutes, Title 14, Section 360, contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

....., District Attorney for the Parish of Orleans.

Indictment of James A. Dombrowski

PARISH OF ORLEANS

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

THE STATE OF LOUISIANA } SS.:

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one JAMES A. DOMBROWSKI late of the Parish of Orleans on the 25th day of January in the year of our Lord, one thousand, nine hundred sixty-four

with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans knowingly and wilfully participate in the management, to wit, act as Executive Director of a subversive organization, to wit, the Southern Conference Educational Fund, said organization being essentially the same as the Southern Conference for Human Welfare, which said organization has been cited by committees of the United States Congress as a Communist front organization on March 29, 1944, and June 16, 1947, while knowing the said Southern Conference Educational Fund to be a subversive organization.

SECOND COUNT

AND NOW THE SAID GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one JAMES A. DOMBROWSKI late of the Parish of Orleans on the 25th day of January in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans while knowingly and wilfully being a member of a Communist front organization known as the Southern Conference Educational Fund, which said organization is essentially the same as the Southern Conference for Human Welfare, which said Southern Conference for Human Welfare having been cited by the committees of the United States Congress as a Communist front organization on March 29, 1944, and on June 16, 1947; while at the same time remaining within the boundaries of the State of Louisiana five consecutive days immediately prior to and on the date of the 25th day January 1964, and that during such time he did knowingly and wilfully fail to register with the Department of Public

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Safety of the State of Louisiana as a member of a Communist front organization on or before the fifth day that he remained in this State, all as required by Louisiana Revised Statutes Title 14, Section 360, contrary to the form of Statute of the State of Louisiana in such cases made and provided and against the peace and dignity of the same.

....., District Attorney for the Parish of Orleans.

Indictment of Bruce Waltzer

PARISH OF ORLEANS

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

THE STATE OF LOUISIANA } ss.:

THE GRAND JURORS of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of Orleans, in the name and by the authority of the said State, upon their oath, PRESENT That one BRUCE WALTZER late of the Parish of Orleans on the 22nd day of January in the year of our Lord, one thousand, nine hundred sixty-four with force and arms in the Parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the Parish of Orleans while knowingly and wilfully being a member of a Communist front organization known as the National Lawyers Guild, which said organization has been cited by committees and sub-committees of the United States Congress as a Communist front organization on March 29, 1944, September 21, 1950 and on April 23, 1956,

and while at the same time remaining continuously within the boundaries of the State of Louisiana five consecutive days immediately prior to and on the date of the 22nd day of January 1964, and that during such time he did knowingly and wilfully fail to register with the Department of Public Safety of the State of Louisiana as a member of a Communist front organization on or before the fifth day that he remained continuously in this State, all as required by Louisiana Revised Statutes Title 14, Section 360.